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In the Supreme Court of the United States

OCTOBER TERM, 1981

LEO J. MEYER, WARDEN,
PETITIONER,

vs.

CLARENCE EUGENE WILSON,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether the "nolle" of a redundant felony murder count, after conviction but prior to sentencing, barred the state from reprosecuting that same count when the conviction and sentence on the intent murder count was subsequently reversed and retried.

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LEO J. MEYER, WARDEN,
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CLARENCE EUGENE WILSON,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

OPINIONS BELOW

This Petition seeks review of the decision of the United States Court of Appeals for the Seventh Circuit which reversed the respondent's conviction for murder. *Wilson v. Meyer,* No. 80-2194 (7th Cir. Nov. 16, 1981) (see attached Appendix A).

In 1971, the respondent was sentenced to consecutive sentences of 10 to 12 years for attempt burglary and 50 to 75 years for intent murder. A third verdict that found the

respondent guilty of felony murder was *nolle prossed* prior to sentencing. The two convictions were affirmed on direct appeal, *People v. Wilson*, 51 Ill.2d 302, 281 N.E.2d 626 (1972), and on appeal from a denial of post-conviction relief, *Wilson v. People*, 13 Ill.App.3d 675, 300 N.E.2d 576 (5th Dist. 1973). The respondent was initially denied habeas corpus relief by the federal district court. *United States ex rel. Wilson v. Warden Cannon* No. 74 C 1417 (N.D. Ill. November 25, 1974). However, the Court of Appeals found that the prosecution had knowingly used perjured testimony and reversed the murder conviction. The attempt burglary conviction was affirmed. *United States ex rel. Wilson v. Warden Cannon*, 538 F.2d 1272 (7th Cir. 1976).

The respondent was retried in 1977 and convicted of murder. The conviction and 50 to 75 year sentence (imposed consecutively to the valid attempt burglary conviction) were affirmed on direct appeal. *People v. Wilson*, 61 Ill.App.3d 1029, 378 N.E.2d 378 (5th Dist. 1978) (see attached Appendix C). On habeas corpus review, the federal district court denied relief. *United States ex rel. Wilson v. Meyer*, No. 79-C-2285 (S.D.Ill. June 27, 1980) (see attached Appendix B). The Court of Appeals reversed the murder conviction for a second time, holding that the retrial of the respondent for murder under a felony murder count or theory constituted a violation of the Double Jeopardy Clause. *Wilson v. Meyer, supra*, Appendix A.

JURISDICTION

The Court of Appeals' decision was rendered on November 16, 1981, reversing the respondent's murder conviction. No petition for rehearing was filed in that court. This Petition is being filed within 90 days of the date of the Court of Appeals

decision as per 28 U.S.C. § 2101(c). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the Constitution of the United States provides, in pertinent part, that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb."

Ill. Rev. Stat., 1969, ch. 38, § 9-1(a) states:

> (a) A person who kills an individual without lawful justification commits murder if, in performing the acts which cause the death:
>
> (1) He either intends to kill or do great bodily harm to that individual or another, or knows that such acts will cause death to that individual or another; or
>
> (2) He knows that such acts create a strong probability of death or great bodily harm to that individual or another; or
>
> (3) He is attempting or committing a forcible felony other than voluntary manslaughter.

STATEMENT OF THE CASE

First Trial

On June 1, 1970, the respondent, Clarence Eugene Wilson, and James Sharp and Donald Mitchell, attempted to burglarize a supermarket in Oblong, Illinois. They were interrupted in this activity by the police chief of Oblong and the officer was fatally shot.

The respondent was indicted on June 10, 1970, by a grand jury in Crawford County on two counts of murder and one count of attempt burglary, all acts occurring in Crawford County on June 1, 1970, at approximately 2:20 A.M. Count I alleged that the respondent,

> ...committed the offense of Murder in that he, intentionally and knowingly shot and killed William Jackson Fancil with a gun, without lawful justification, in violation of Chapter 38, Section 9-1, of the Illinois Revised Statutes 1969...

(Res. App. 1)[1] Under Count II, the respondent was alleged to have,

> ...committed the offense of Murder, in that he, intentionally and knowingly shot and killed William Jackson Fancil with a gun, without lawful justification, while attempting to commit the offense of Burglary, in violation of Chapter 38, Section 9-1, of the Illinois Revised Statutes 1969...

(Res. App. 2) Count III charged the respondent with attempt burglary.

Pursuant to the respondent's motion for a change of venue, the case was transferred from Crawford County to Wayne County. Both the People and the respondent presented evidence for the jury's consideration. Following closing arguments, the jury was instructed on the law applicable to the

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[1] The record in this case consists of several boxes of the state and federal court records. In *Wilson v. Meyer*, No. 80-2194 (7th Cir. Nov. 16, 1981), the People, who were the respondent in that court, compiled an appendix containing documents relevant to the double jeopardy issue. References to this appendix are cited as Res. App. with the appropriate page number following the cite.

three charges. Instructions were given as to the People's burden of proof as to both the murder and felony murder indictments. (Res. App. 9-10) Eight verdict forms were submitted to the jury including separate forms for murder and felony murder. (Res. App. 11-18) After deliberating, the jury found the respondent guilty of murder, of murder while attempting to commit the offense of burglary, and of attempt burglary. (Res. App. 16-18) The jury declined to impose the death sentence on the respondent. (Res. App. 12, 14)

On September 1, 1970, the court conducted a hearing in aggravation and mitigation for the purpose of imposing sentence. After the presentation of testimony, counsel were allowed to address the court on the question of an appropriate sentence. Respondent's counsel first stated that, "The matter before us today involves the sentencing of Clarence Eugene Wilson for the offenses of Murder and Attempted Burglary." (Res. App. 19-23) Counsel, while making no reference to the felony murder conviction, recommended that the court not impose a harsh sentence. (Res. App. 19-21)

The State's Attorney then addressed the trial judge on the matter of sentencing and stated:

> First off, your Honor, before I make any recommendation, I think we still have all three Counts pending, all three Counts of the Indictment, and which he was found guilty of all three Counts, I would ask the Court to consider nolle of Count II of the Indictment.

(Res. App. 21) The State's Attorney reminded the court that Count II charged murder while attempting to commit burglary. (Res. App. 21) Due to the respondent's past criminal history, he recommended a 60 to 75 year sentence on the murder conviction and 12 to 14 sentence on the attempt burglary conviction. (Res. App. 22) The defendant made no objection to the People's motion to *nolle prosse* Count II.

The trial court then stated: "All right, I will show on Motion to nolle Count II that the Motion is granted, and Count II of the Indictment is nolled." (Res. App. 22) The respondent was sentenced to a term of 50 to 75 years on the murder conviction and to 10 to 12 years on the attempt burglary conviction, the sentences to be served consecutively. (Res. App. 24) On direct appeal to the Illinois Supreme Court, both the judgment imposed on the convictions and the sentences were affirmed. *People v. Wilson,* 51 Ill.2d 302, 281 N.E.2d 626 (1972).

The respondent filed a petition in the Circuit Court of Wayne County seeking post-conviction relief pursuant to *Ill. Rev. Stat.* 1971, ch. 38, § 122-1 *et seq.* He alleged that his constitutional rights had been violated as the People had knowingly used perjured testimony at his trial in violation of *Napue v. Illinois,* 360 U.S. 264 (1959). After conducting an evidentiary hearing, the trial court denied the post-conviction petition. The Appellate Court of Illinois, Fifth District, affirmed the trial court's judgment. *Wilson v. People,* 13 Ill. App. 3d 675, 300 N.E.2d 576 (5th Dist. 1973).

Three years after the appellate court decision, the United States Court of Appeals for the Seventh Circuit vacated the respondent's murder conviction and ordered the People either to retry or release the defendant from custody. *United States ex rel. Wilson v. Cannon,* 538 F.2d 1272 (7th Cir. 1976). The Court of Appeals, in exercising its habeas corpus jurisdiction and reversing a federal trial court's order denying habeas relief, held that *Napue* controlled the respondent's case and that there was not sufficient evidence apart from the evidence affected by the *Napue* error to support the petitioner's murder conviction. The attempt burglary conviction was not materially effected by the constitutional violations and was affirmed. The court accordingly ordered that: "Within a reasonable time to be fixed by the district court, the

State of Illinois shall be given the opportunity to retry [Wilson] on the murder charge." 538 F.2d at 1278.

Implementing the mandate of the Court of Appeals, the United States District Court for the Northern District of Illinois ordered that the respondent be re-tried by January 24, 1977.

Second Trial

Count I of the original three-count indictment, charging the respondent with the murder of William Jack Fancil, was reinstated by the Wabash County Circuit Court in September, 1976. (Res. App. 26) On November 12, 1976, the respondent was indicted by the Crawford County Grand Jury and charged as follows:

> That on or about June 1, 1970, in Crawford County, Clarence Eugene Wilson committed the offense of Murder in that he without lawful justification and while attempting to commit a forcible felony, to wit: Burglary, performed acts which caused the death of JACK FANCIL in violation of Paragraph 9-1(a)(3), Chapter 38, Illinois Revised Statutes.

(Res. App. 36) The People also filed a motion to reinstate the original felony murder indictment. The respondent, through appointed counsel, moved that the felony murder indictment be dismissed on the basis that prosecuting the respondent under the new indictment violated both the double jeopardy clause of the Illinois Constitution and *Ill. Rev. Stat.* 1975, ch. 38, § 3-4. The trial court denied the People's motion to reinstate and dismissed the felony murder count. (Res. App. 37-58)

The trial on the remaining murder charge began on January 11, 1977. Following the presentation of evidence, the

People attempted to have I.P.I. Criminal 7.01 & 7.02 issued as People's Instructions 11 and 12. (Res. App. 59, 60)[2] Instruction 7.01, phrased in the alternative, included subparagraph (4), the felony murder instruction. (Res. App. 59) Instruction 7.02 stated the issues and the propositions that the State was required to prove. (Res. App. 60) These two instructions were refused with instructions being given that omitted any reference to felony murder. (Res. App. 61-62) The jury could not reach a verdict and a mistrial was declared on January 14, 1977.

Third Trial

After the mistrial in Wabash County, the district court granted the People a 90-day extension to retry the respondent. The trial was moved to Williamson County on the

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[2] The two Illinois Pattern Instructions provide as follows:

7.01 Definition of Murder

A person commits the offense of murder when he kills an individual [without lawful justification] if, in performing the acts which cause the death,

[1] he intends to kill or do great bodily harm to that individual or another;

or

[2] he knows that such acts will cause death to that individual or another;

or

[3] he knows that such acts create a strong probability of death or great bodily harm to that individual or another;

or

[4] he [(is attempting to commit) (is committing)] the offense of _____.

7.02 Issues in Murder

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respondent's motion for change of venue and trial was set for April 18, 1977.

During the hearing on pretrial motions, the People moved the court to reinstate the felony murder charge. The respondent opposed the motion to reinstate on the grounds that it violated the constitutional prohibition against double jeopardy. The trial judge initially agreed with the respondent and denied the motion to reinstate. However, upon reconsideration, the court granted the People leave to reinstate the felony murder count.

At trial, both the People and the respondent presented evidence to the jury. After closing arguments, the jury was instructed as to the State's burden of proof as to offense of

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To sustain the charge of murder, the State must prove the following propositions:

First: That the defendant performed the acts which caused the death of _____; and

Second: That when the defendant did so,

[1] he intended to kill or do great bodily harm to _____;

or

[2] he knew that his act would cause death or great bodily harm to _____;

or

[3] he knew that his acts created a strong probability of death or great bodily harm to _____;

or

[4] he [(was attempting to commit) (was committing)] the offense of _____.

If you find from your consideration of all the evidence that each one of these propositions has been proved beyond a reasonable doubt, you should find the defendant guilty.

If you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, you should find the defendant not guilty.

murder as outlined in I.P.I. Criminal 7.02. (Res. App. 96-97) This instruction included the felony murder theory. Additionally, the jury was given a general verdict form for murder. (Res. App. 98) On April 22, 1977, they found the petitioner guilty of the murder of Officer Jack Fancil. The trial court entered judgment on the verdict and sentenced the respondent to a term of 50 to 75 years, which was to run consecutively to the attempt burglary sentence imposed in 1970. The Fifth District Illinois Appellate Court affirmed the conviction in its opinion of *People v. Wilson*, 61 Ill. App. 3d 1029, 378 N.E.2d 378 (5th Dist. 1978) (Appendix C).

The petitioner filed for a writ of habeas corpus in the United States District Court for the Southern District of Illinois. The petition requested habeas relief on a number of grounds. Included in the pleadings was the claim that the retrial and subsequent conviction in Williamson County violated the respondent's rights under the Double Jeopardy Clause of the Fifth Amendment. In its opinion, the district court considered each of the contentions in great detail. The court found that none of the allegations warranted habeas relief and granted the People's motion for summary judgment. *United States ex rel. Wilson v. Meyer*, No. 79-C-2285 (S.D. Ill. June 27, 1980) (Appendix B).

On appeal, the Court of Appeals for the Seventh Circuit reversed the conviction. The court found that the *nolle prosequi* of the felony murder count subsequent to the respondent's original conviction but prior to sentencing barred the People from reprosecution of the respondent for felony murder. The cause was remanded for retrial under an intent murder count or theory. *Wilson v. Meyer*, No. 80-2194 (7th Cir. Nov. 16, 1981, Appendix A).

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

THE "NOLLE" OF A REDUNDANT FELONY MURDER COUNT, AFTER CONVICTION BUT PRIOR TO SENTENCING, DID NOT BAR THE STATE FROM REPROSECUTING THAT COUNT WHEN THE CONVICTION ON THE INTENT MURDER COUNT WAS SUBSEQUENTLY REVERSED AND RETRIED. THE COURT OF APPEALS' DECISION TO THE CONTRARY STEMS FROM A MISINTERPRETATION OF ILLINOIS LAW AND A MISAPPLICATION OF THIS COURT'S DECISIONS.

The Court of Appeals for the Seventh Circuit found that the People of the State of Illinois were barred from retrying the respondent in 1977 for felony murder because, in 1970, the State's Attorney had *nolle prossed* the redundant felony murder count after conviction. Under that court's analysis, the successful appeal of the intent murder conviction and sentence did not reactivate the felony murder count's viability for retrial.

The ruling of the Court of Appeals penalized the prosecutor's action even though the act of the *nolle prosse* of the redundant verdict was designed to prevent an unconstitutional judgment from being imposed. The double jeopardy ramifications of vacating redundant findings of guilt is a problem which will recur and thus, needs to be addressed by the Court. More importantly, the improper application of established double jeopardy principles by the federal appellate court warrants the granting of this Petition.

Under the Fifth Amendment to the United States Constitution, "No person. . . shall be subject for the same offense to be

twice put in jeopardy of life or limb." This constitutional guarantee is applicable to the states through the Due Process Clause of the Fourteenth Amendment. *Benton v. Maryland,* 395 U.S. 784 (1969). The Double Jeopardy Clause consists of three separate guarantees which protect against: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense. *North Carolina v. Pearce,* 395 U.S. 711, 717 (1969).

The successful appeal of a conviction does not bar reprosecution of the defendant on the same charge. *United States v. Scott,* 437 U.S. 82, 91 (1978); *United States v. Ball,* 163 U.S. 662, 672 (1896). When a defendant's first conviction has been reversed and the matter remanded, the slate has been wiped clean and the Government is free to prosecute the defendant on a different statutory violation whether it is considered the same or a separate offense. *United States v. Poll,* 538 F.2d 845, 847 (9th Cir.), *cert. denied,* 429 U.S. 977 (1976), *reh. denied,* 429 U.S. 1079 (1977), citing *United States v. Ewell,* 383 U.S. 116, 124-125 (1966); *See United States v. Ragano,* 520 F.2d 1191 (5th Cir. 1975), *cert. denied,* 427 U.S. 905 (1976). Double jeopardy principles do not prohibit reprosecution on a higher offense after an appellate court has reversed a plea-bargained conviction on a lesser included offense. *Hawk v. Berkemer,* 610 F.2d 445 (6th Cir. 1979); *United States v. Williams,* 534 F.2d 119 (8th Cir.), *cert. denied.* 429 U.S. 894 (1976); *United States v. Anderson,* 514 F.2d 583 (7th Cir. 1975); *United States ex rel. Williams v. McMann,* 436 F.2d 103 (2nd Cir. 1970); *Ward v. Page,* 424 F.2d 491 (10th Cir. 1970); *United States v. Myles,* 430 F. Supp. 98 (D.D.C. 1977), *aff'd without opinion,* 559 F.2d 161 (D.C. Cir. 1978).

Although a single criminal act may violate two separate statutory offenses, it may not be permissible to impose cumulative punishment.

> The applicable rule is that where the same act or transaction constitutues a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or one, is whether each provision requires proof of a fact which the other does not.

Blockburger v. United States, 284 U.S. 299, 304 (1932); *See also Brown v. Ohio,* 432 U.S. 161, 166 (1977).

It is against this background of established double jeopardy principles that this Court must review the validity of the respondent's 1977 murder conviction. The Illinois appellate court interpreted the 1970 *nolle prosse* of the felony murder count as an attempt by the People to make a redundant verdict disappear and prevent prejudice to the petitioner. *People v. Wilson,* 61 Ill. App. 3d 1029, 378 N.E.2d 378 (5th Dist. 1978). Citing *People v. Allen,* 56 Ill. 2d 536, 543, 309 N.E.2d 544, 547, *cert. denied,* 419 U.S. 865 (1974), the court found that under Illinois law there is but one crime of murder, not three separate offenses. The subparagraphs of section 9-1(a) describe mental states or conduct which must accompany the act which caused the death.[3]

The state appellate court further noted that the trial judge and counsel in the 1970 trial, did not believe that judgment

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[3] *Ill. Rev. Stat.* ch. 38, § 9-1(a) provides as follows:

§ 9-1 . . . (a) A person who kills an individual without lawful justification commits murder if, in performing the acts which cause the death:

(1) He either intends to kill or do great bodily harm to that individual or another, or knows that such acts will cause death to that individual or another; or

(2) He knows that such acts create a strong probability of death or great bodily harm to that individual or another; or

(3) He is attempting or committing a forcible felony other than voluntary manslaughter.

and sentence could be imposed for both the intent murder and felony murder verdicts.

> The fact that a redundant verdict existed at all resulted from the submission of separate verdicts on each rather than submitting general verdicts of guilty or not guilty of murder.
>
> * * *
>
> [The felony murder] count was redundant after the verdicts were returned because it represented merely another theory of murder. In effect, the two verdicts can be viewed as having merged into a single judgment of murder. When defendant's conviction was vacated by the federal court the prosecution was entitled to retry him for murder, under any of the three theories set out in section 9-1(a).

61 Ill. App. 3d at 1032-1033, 378 N.E.2d at 380.

The United States District Court for the Southern District of Illinois agreed with the Illinois appellate court and rejected the petitioner's double jeopardy attack. *United States ex rel. Wilson v. Meyer*, No. 79-C-2285 (S.D. Ill. June 27, 1980). By appealing his murder conviction, the petitioner "exposed himself to the retrial of the issues concerning the conviction without the right to invoke the protection of the double jeopardy clause." Appendix B at 4. The district court acknowledged that under Illinois law, there is but one crime of murder with different theories falling under the definition. Thus, it was consistent with both Illinois and federal law for the respondent to be retried on a felony murder count.

> [T]he Seventh Circuit in vacating the murder conviction expose[d] the petitioner [Wilson] to retrial for the crime of murder which includes by definition all theories... The prosecution has not been given a second chance to convict petitioner for he was convicted at the first trial and only exposed himself to a new trial when he appealed

> his murder conviction. Petitioner is the one that received the second chance in this instance and it would be unjust and contrary to the policy behind the double jeopardy clause to allow the petitioner to escape conviction due to a procedural quirk which has not harmed the petitioner in any way.

Appendix B at 4-5.

The Court of Appeals below found that jeopardy had attached to the felony murder count. Forcing the respondent to undergo a second prosecution for felony murder subjected the petitioner to successive exposure to the rigours of trial in violation of this Court's decisions in *Green v. United States,* 355 U.S. 184 (1957) and *Abney v. United States,* 431 U.S. 551 (1977). According to the Seventh Circuit, the People's act to *nolle prosequi* the felony murder count amounted to an indication by the People that it would no longer prosecute or proceed against the respondent on the felony murder count.

Only by attaching undue importance to the *nolle prosse* of the redundant felony murder verdict and ignoring relevant state and federal law was the Court of Appeals able to find a violation of the Double Jeopardy Clause. This ruling is in direct conflict with applicable decisions of this Court and merits the granting of the Petition.

In determining the validity of the double jeopardy claim, great deference is accorded to the rules of criminal pleading peculiar to the State of Illinois, the constitutionality of which is not an issue. *Illinois v. Sommerville,* 410 U.S. 458 (1973); *Duncan v. Tennessee,* 405 U.S. 127 (1972). Ingrained in Illinois law is the rule that there is but one crime of murder, not three separate and distinct offenses. *Allen, supra.* As noted in *Allen,* the subparagraphs of section 9-1(a) describe mental states or conduct which must accompany the act which causes death. They do not describe separate crimes but the single

crime of murder. A defendant accused of one murder and charged in separate counts under the different theories can only have judgment and sentence entered on the more serious offense. *People v. Maynard*, 24 Ill. App. 3d 468, 321 N.E.2d 370 (1st Dist. 1974); *People v. Holiday*, 21 Ill. App. 3d 796, 316 N.E.2d 236 (1st Dist. 1974); *People v. Robinson*, 106 Ill. App. 2d 78, 246 N.E.2d 15 (1st Dist. 1969); *See People v. King*, 66 Ill. 2d 551, 363 N.E.2d 838, *cert. denied*, 434 U.S. 894 (1977); *People v. Schlenger*, 13 Ill. 2d 63, 147 N.E.2d 316 (1958).[4]

The *nolle prosse* of the felony murder count after the verdict was reached did not foreclose a subsequent retrial on that theory of murder. As defined in Black's Law Dictionary, *nolle prosequi* is "a formal entry upon the record, by the . . . prosecuting officer in a criminal action, by which he declares that he 'will no further prosecute' the case, either as to some of the counts, or some of the defendants, or altogether." If the prosecution had *nolled* the felony murder count after the jury had been empanelled but prior to verdict, further prosecution on that count would have been barred by the double jeopardy clause. *See People v. Hines*, 30 Ill. 2d 152, 195 N.E.2d 712 (1964).

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[4] Under *Ill. Rev. Stat.* 1969, ch. 38, § 9-1, the penalties for intent murder and felony murder were identical. However, a conviction for intent murder would be a more serious offense than one for felony murder. Harsher treatment would be warranted at sentencing where the evidence establishes the defendant as the individual who directly caused the victim's death. Such was the case at the sentencing hearing in the instant case. (Res. App. 118-120) Additionally, the instant murder verdict was the more serious in that it more readily allowed for the imposition of consecutive sentences. *See People v. Williams*, 60 Ill. 2d 1, 322 N.E.2d 819 (1975); *People v. Glenn*, 63 Ill. App. 3d 344, 380 N.E.2d 390 (5th Dist. 1978).

What occurred at the 1970 sentencing hearing was not a *nolle prosse* in the normal sense of the term, as the People did not prematurely terminate the prosecution by expressing their intent not to proceed with the case. The 1970 murder prosecution had been terminated by the jury's verdict before the so-called *"nolle"* took place and the petitioner can hardly claim that he was led to rely on the People's abandonment of a prosecution. *See Hines, id.* The People moved to vacate a redundant verdict which the petitioner did not object to. (Res. App. 19-23) Under these circumstances, the use of the word *"nolle"* was improper as it did not pertain to the events that transpired. The effect of the granting of the motion was to aid the petitioner by eliminating potentially prejudicial matters from records that might eventually be considered by parole authorities and by eliminating the need to appeal from an improper felony murder judgment and sentence. *See Wilson*, 61 Ill. App. 3d at 1033, 378 N.E.2d at 380. If the State's Attorney had not moved to vacate the felony murder count, the trial court would have been required, under Illinois law and the principles of *Blockburger, supra*, to *sua sponte*, vacate the felony murder verdict and only impose judgment and sentence on the more serious intent murder verdict.

The *Green* and *Abney* decisions, cited by the Court of Appeals as prohibiting a second prosecution of the respondent for felony murder, actually support the People's position. In *Green*, the jury found the defendant guilty of arson and of second degree murder but did not render a verdict on the charge of murder in the first degree. The defendant was sentenced to one to three years' imprisonment for arson and five to twenty years' imprisonment for murder in the second degree. After the defendant successfully appealed his conviction of second degree murder, he was tried again for first degree murder under the original indictment. A new jury

found the defendant guilty of first degree murder and he was given the mandatory death sentence.

This Court found that the second trial for first degree murder placed Green in jeopardy twice for the same offense in violation of the Constitution. When given the choice between finding the defendant guilty of either first or second degree murder, the jury chose the latter. This verdict constituted an implicit acquittal on the charge of first degree murder. Additionally, the jury was dismissed without returning an express verdict on the charge of first degree murder and without the defendant's consent. It was given a full opportunity to return a verdict and no extraordinary circumstances appeared which prevented it from doing so. The defendant's jeopardy for first degree murder came to an end when the jury was discharged prohibiting a retrial for that offense.

The Court of Appeals refers to *Abney* for the proposition that the second prosecution of the respondent for felony murder violated the primary purpose of the Double Jeopardy Clause; namely, prohibiting successive exposure to the rigours of trial. Although this general principle of constitutional law is not contested, the factual basis for the *Abney* decision actually supports the people's position.

The defendants in *Abney*, who were charged in a single indictment with both a conspiracy and an attempt to violate the Hobbs Act, challenged the indictment as duplicitous. The district court refused to dismiss the indictment but required the prosecution to prove all elements of both offenses. A general verdict of guilty was returned by the jury. The federal appellate court ordered a new trial on evidentiary grounds and directed the Government to elect between the conspiracy and attempt charges on remand.

After the Government elected to proceed on the conspiracy charge, the defendents moved to dismiss the indictment on

the ground that retrial would expose them to double jeopardy. The district court decision denying the defendents' motion to dismiss was affirmed by this Court. According to the unanimous opinion, it could not be assumed that the jury disregarded the trial court's instructions at the initial trial that it could not return a guilty verdict unless the Government proved beyond a reasonable doubt all elements of both offenses charged in the indictment. Despite the defendants' contentions, the jury did not acquit the defendants of the conspiracy charge, while convicting them on the attempt charge.

In the case now before the Court, the respondent was found guilty on two separate theories of murder even though only one death occurred. Unlike *Green*, there is no implicit acquittal that would trigger the application of double jeopardy protection on a subsequent retrial on the felony murder charge.[5] That the People did prove each and every element of the intent murder and felony murder charges, would, under *Abney*, seemingly allow reprosecution at a later date.

As sentencing law becomes more developed and complex, the prosecutor will be faced with the recurring problem of redundant verdicts for which cumulative punishments cannot be imposed. An analogy can be drawn between multiple murder verdicts under *Ill. Rev. Stat.* ch. 38, sec. 9-1 and multiple verdicts that result from the prosecution of a robbery of a federal bank.

This Court has had to determine whether one could receive separate punishments for bank robbery (18 U.S.C. § 2113(a)), bank robbery committed by the use of a dangerous weapon or device (18 U.S.C. § 2113(d)), and use of a firearm to commit

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[5] *See also Turner v. Arkansas*, 407 U.S. 366 (1972) (acquittal of murder during course of robbery precluded reprosecution on separate robbery charge).

a felony (18 U.S.C. § 924(c)(2)). *Prince v. United States*, 352 U.S. 322 (1957); *Simpson v. United States*, 435 U.S. 6 (1978).[6] Where the violator is subject to enhanced punishment under 18 U.S.C. § 2113(d), additional penalties cannot be imposed under either 18 U.S.C. § 2113(a) and 18 U.S.C. § 924(c). While Congress intended to define greater and lessor offenses with the latter "merging" into the former upon a defendant's conviction of a combination of the offenses, it did not intend to "pyramid" the penalties even when the sentences are concurrent. *Simpson, supra; Prince, supra; Government of Virgin Islands v. Dowling*, 633 F.2d 660, 668 (3rd Cir. 1980); *Johnson v. United States*, 619 F.2d 366, 368 (5th Cir. 1980); *Compare Albernaz v. United States*, ____ U.S. ____, 101 S.Ct. 1137 (1981).

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[6] 18 U.S.C.A. § 2113(a) states:

(a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association; or Whoever enters or attempts to enter any bank, credit union, or any savings and loan association, or any building used in whole or in part as a bank, credit union, or as a savings and loan association, with intent to commit in such bank, credit union, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank or such savings and loan association and in violation of any statute of the United States, or any larceny —

Shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.

18 U.S.C.A. § 2113(d) states:

(d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than $10,000 or imprisoned not more than twenty-five years, or both.

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Both the First and Seventh Circuit Courts of Appeals have extended the holding in *Prince* to prohibit multiple convictions under 18 U.S.C. § 2113. *See O'Clair v. United States*, 470 F.2d 1199 (1st Cir. 1972), *cert. denied*, 412 U.S. 921 (1973), and *Wright v. United States*, 519 F.2d 13 (7th Cir.), *cert. denied*, 423 U.S. 932 (1975).[7] As discussed in *Wright*, in addition to the double jeopardy problems raised by the imposition of two convictions for one crime, there would exist "the several and varied adverse collateral effects of a conviction, independent of the sentence." 519 F.2d at 19.[8]

Where the federal prosecutor is faced with multiple guilty verdicts under the various subsections of 18 U.S.C. § 2113 and

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18 U.S.C.A. § 924(c)(2) states:

(c) Whoever—

(2) carries a firearm unlawfully during the commission of any felony for which he may be prosecuted in a court of the United States, shall, in addition to the punishment provided for the commission of such felony, be sentenced to a term of imprisonment for not less than one year nor more than ten years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to a term of imprisonment for not less than two nor more than twenty-five years and, notwithstanding any other provision of law, the court shall not suspend the sentence in the case of a second or subsequent conviction of such person or give him a probationary sentence, nor shall the term of imprisonment imposed under this subsection run concurrently with any term of imprisonment imposed for the commission of such felony.

[7] In *Wright*, it was noted that in *Heflin v. United States*, 358 U.S. 415 (1959), this Court, *sub silentio*, agreed that the petitioner could not lawfully receive multiple convictions under the statute.

[8] These collateral effects of an additional conviction for a defendant could include an enhanced sentence under a state habitual criminal statute, a problem at securing early parole, and a subsequent use of the conviction to impeach the defendant's character if put in issue at a future trial. *Wright*, 519 F.2d at 19.

18 U.S.C. § 924, he would attempt to secure the enhanced punishment for the more serious offense, usually the section 2113(d) violation. Concommitantly, it would be his duty to inform the trial court either (a) that sentences could not be imposed on each conviction, *see Simpson, supra; Prince, supra;* or (b) that the lessor convictions must be vacated and judgment and sentence only be entered on the most serious violation, *Wright, supra; O'Clair, supra*. Should the defendant ultimately secure a reversal of the crime upon which he would be sentenced, the Government would undoubtedly be free to reprosecute under any statutory theory that was viable from the outset of the proceedings. *Scott, supra; Ewell, supra*.

The instant case involves an identical situation in Illinois. The State's Attorney had secured an attempt burglary verdict, an intent murder verdict, and a felony murder verdict. At the sentencing hearing, he was only entitled to secure judgment and sentence on the attempt burglary verdict and one of the two murder verdicts. Federal constitutional law, *Blockburger, supra*, and Illinois statutory and case law, mandated that judgment and sentence only be entered on the more serious murder verdict, that of intent murder. Although it may have been the state trial judge's responsibility to vacate the redundant felony murder verdict, the State cannot be faulted for ensuring that a constitutionally valid judgment and sentence be entered. Had the prosecutor proceeded without a *nolle prosequi* of the felony murder verdict, the net result would have been identical: the trial court or a reviewing court would have been required to vacate the felony murder conviction, the less serious of the two judgments.

The misapplication of the decisions of this Court has resulted in a finding that the respondent's rights under the Double Jeopardy Clause were violated. However, looking at the particular facts and circumstances of this case, the respondent can point to no finding of fact in his favor that would for-

bid reprosecution for felony murder. The prosecutor, who was attempting to vacate a redundant and impermissible verdict, should not be penalized by the Court of Appeals' hypertechnical focusing on his use of the word "nolle." Under these circumstances, it would be appropriate for this Court to exercise its discretion and grant the Petition for a Writ of Certiorari.

CONCLUSION

For the foregoing reasons, the petitioner, as the representative of the People of the State of Illinois, prays that this Court grant the instant Petition for Writ of Certiorari and, upon review, reverse the Court of Appeals' decision which granted habeas corpus relief to the respondent.

Respectfully submitted,

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APPENDICES

APPENDIX A

In the United States Court of Appeals

For the Seventh Circuit

No. 80-2194
CLARENCE EUGENE WILSON,

Petitioner-Appellant,

vs.

LEO J. MEYER, Warden,

Respondent-Appellee.

Appeal from the United States District Court for the Southern District of Illinois, Benton Division. No. 79-C-2285 — William L. Beatty, Judge.

ARGUED MAY 29, 1981 — DECIDED NOVEMBER 16, 1981

Before PELL, *Circuit Judge,* MARKEY, *Chief Judge,** and WOOD, *Circuit Judge.*

WOOD, *Circuit Judge.* Petitioner Clarence Wilson appeals from a denial of his habeas corpus petition under 28 U.S.C.§2254. Before us is one issue relating to Wilson's Fifth Amendment right of freedom from double jeopardy: whether the *nolle prosequi* of the felony murder count subsequent to Wilson's conviction but prior to sentencing barred Illinois from reprosecution of Wilson for felony murder. We

* The Honorable Howard T. Markey, Chief Judge of the United States Court of Customs and Patent Appeals, is sitting by designation.

conclude that Illinois' actions to reprosecute Wilson violated his double jeopardy rights and therefore reverse.

I.

On June 1, 1970, the police chief of Oblong, Illinois was fatally shot when he discovered Wilson and two others attempting to burglarize a local grocery. The legal tangle which followed is more complex than that event. In August, 1970, after a change of venue from Crawford to Wayne County, Wilson was tried and convicted of intent murder, felony murder, and attempted burglary.[1] The State brought these charges as separate counts and the jury returned a verdict of guilty on each.[2] Prior to sentencing, the court allowed the prosecutor's motion to *nolle prosequi* the felony murder

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[1] The Illinois Criminal Code, Ill. Rev. Stat., ch. 38, §9-1(a) (1979), provides in pertinent part that:

> a) A person who kills an individual without lawful justification commits murder if, in performing the acts which cause the death:
>
> 1) He either intends to kill or do great bodily harm to that individual or another, or knows that such acts will cause death to that individual or another; or...
>
> 3) He is attempting or committing a forcible felony other than voluntary manslaughter.

It is settled in Illinois, as declared by the Illinois Supreme Court, that under Section 9-1(a) "[t]here is but one crime of murder" and not three separate offenses. *People v. Allen*, 56 Ill. 2d 536, 543, 309 N.E.2d 544, 547, *cert. denied*, 419 U.S. 865 (1974). Accordingly, under Illinois law, intent murder and felony murder, Sections 9-1(a)(1) and 9-1(a)(3) respectively, constitute alternative bases for a murder conviction.

[2] The indictment read as follows:

> COUNT NO. I
>
> Clarence Eugene Wilson...

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count, Count II. The court then entered consecutive sentences of fifty to seventy-five years for intent murder, Count I, and ten to twelve years for attempted burglary, Count III. After an unsuccessful direct appeal and related motions for post-conviction relief, Wilson petitioned the district court for a writ of *habeas corpus*.[3] Upon appeal, after the writ was denied, we found the State knowingly used perjured testimony, and therefore vacated the Count I intent

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...committed the offense of Murder, in that he, intentionally and knowingly shot and killed William Jackson Fancil with a gun, without lawful justification, in violation of Chapter 38, Section 9-1, of the Illinois Revised Statutes 1969.

COUNT NO. II

Clarence Eugene Wilson...

...committed the offense of Murder, in that he, intentionally and knowingly shot and killed William Jackson Fancil with a gun, without lawful justification, while attempting to commit the offense of Burglary, in violation of Chapter 38, Section 9-1, of the Illinois Revised Statutes 1969.

COUNT NO. III

Clarence Eugene Wilson...

...committed the offense of Attempt, in that Clarence Eugene Wilson, with the intent to commit the offense of Burglary, he, without authority, intentionally and knowingly attempted to enter the building...with the intent to commit therein a felony or theft, in violation of Chapter 38, Section 8-4, of the Illinois Revised Statutes 1969.

Crawford County Circuit Court, June 10, 1970, Respondent's Appendix ("R.A.") at 1-4.

[3] The proceedings subsequent to the Wayne County trial and prior to our consideration of Wilson's first habeas petition are set out in detail in *United States ex rel. Wilson v. Warden Cannon, Stateville Penitentiary*, 538 F.2d 1272, 1274-75 (7th Cir. 1976), and in *People v. Wilson*, 61 Ill. App. 3d 1029, 378 N.E.2d 378 (5th Dist. 1978).

murder charge and remanded the proceeding for retrial within a reasonable time. *United States ex rel. Wilson v. Warden Cannon, Stateville Penitentiary,* 538 F.2d 1272, 1274-76 (7th Cir. 1976). The felony murder count, Count II, was not involved in that appeal. The conviction for burglary was allowed to stand. *Id.*

Upon remand to the Illinois court, a 1976 grand jury indicted Wilson again for felony murder.[4] The State then moved to consolidate the pending indictments, or, in the alternative, to reinstate the previously dismissed felony murder count of the original indictment. The Circuit Court of Wabash County, upon a change of venue, eventually denied both motions pursuant to Wilson's argument that reinstatement or joinder of the felony murder count would violate his constitutional guarantee against double jeopardy. The Wabash court allowed the State to proceed only on the intent murder count of the original indictment. A mistrial, however, was declared after the jury failed to reach a verdict.

In February 1977, venue was transferred to Williamson County, the fourth county to be involved, where the State again moved to reinstate the original felony murder count. The Williamson court granted the motion and permitted the State to present both intent murder and felony murder as alternative counts. Rather than pronouncing separately on each count, as in the first trial, the jury, as permitted by the

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[4] This indictment read:

> that on or about June 1, 1970, in Crawford County, Clarence Eugene Wilson committed the offense of Murder in that he, without lawful justification and while attempting to commit a forcible felony to-wit: Burglary, performed acts which caused the death of Jack Fancil in violation of Paragraph 9-1(a)(3) Chapter 38, Illinois Revised Statutes.

No. 76-CF-41, Crawford County Bill of Indictment, R.A. at 36.

instructions, returned a single general verdict of guilty.[5] The court imposed a sentence of fifty to seventy-five years to run consecutively with the sentence imposed on Wilson in 1970 for attempted burglary.[6] The conviction was affirmed. *People v. Wilson,* 61 Ill. App. 3d 1029, 378 N.E.2d 378 (5th Dist. 1978).

Wilson then brought a second petition for *habeas* relief. In this petition he alleged in pertinent part that his retrial and conviction for murder after the felony murder count had been *nolle prossed* in 1970 and reinstated in 1977 placed him in double jeopardy. The district court denied Wilson's petition. *United States ex rel. Wilson v. Meyer,* No. 79-2285 (S.D. Ill. June 27, 1980), R.A. 129-40. This appeal followed.

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[5] The general verdict returned in 1977 against Wilson prevents us from ascertaining which murder theory was utilized by the jury in reaching its decision. Too many signs indicate that the State secured the murder conviction by prosecuting Wilson for felony murder. The record indicates that the prosecutor relied exclusively on proof of Wilson's participation in the attempted burglary to secure the murder conviction. The state trial judge in Wilson's third trial suggested that the weakest case involved the intent murder theory; conversely, he thought felony murder represented its strongest case. The prosecutor also emphasized the importance of the felony murder theory in his closing remarks. He stated that the State had only to prove Wilson aided and abetted in the commission of a burglary, as opposed to showing Wilson actually "pulled the trigger." Record at 346-47. The jury also appears to have paid specific attention to the felony murder theory. While sequestered, it sent a note back to the judge explicitly asking for more information about the felony murder charge.

[6] Wilson has already completed his sentence for attempt burglary. Record at 287, Exhibit D.

II.

The Double Jeopardy Clause of the Fifth Amendment provides that: "No person . . . shall be subject for the same offence to be twice put in jeopardy of life or limb," U.S. Const. Amend. 5. This constitutional guarantee is applicable to the states through the Due Process Clause of the Fourteenth Amendment, U.S. Const. Amend. 14, *Benton v. Maryland*, 395 U.S. 784 (1969), and consists of three separate guarantees which protect against: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense, *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969). Because Wilson asserts that the *nolle prosse* of the felony murder count bars his later reprosecution for felony murder, we are concerned with only the second and third of those guarantees.

The State argues, with which the district court agreed, that the vacation of Wilson's intent murder conviction and related remand, resulting from the first appeal to this court, "wiped the slate clean" so that he might be retried on *any* of the underlying and alternative murder theories, including felony murder. That is so, it is argued, since murder is one crime in Illinois and because the Double Jeopardy Clause permits retrial of a defendant in many circumstances after reversal of a conviction.

There exist a plethora of decisions from various courts which are near our case factually, some of which the State urges are dispositive of Wilson's double jeopardy claim. Our research, however, has not revealed nor has the State cited to us any controlling decision.

The Supreme Court, early on, in *United States v. Ball*, 163 U.S. 662, 672 (1896), held that the Double Jeopardy Clause barred the reprosecution of a defendant who had earlier been acquitted, but not the reprosecution of similar defendants

convicted at the same trial who were granted a new trial on appeal based upon a faulty indictment. In so holding, the Court advanced the following principles governing retrial of defendants who have successfully appealed prior convictions:

> Their plea of former conviction cannot be sustained, because upon a writ of error sued out by themselves the judgment and sentence against them were reversed, and the indictment ordered to be dismissed .... [I]t is quite clear that a defendant, who procures a judgment against him upon an indictment to be set aside, may be tried anew upon the same indictment, or upon another indictment, for the same offense of which he had been convicted.

Id., 163 U.S. at 671-72 (citations omitted). The current rationale utilized by the Court to justify the *Ball* rule focuses, *inter alia*, upon the "fairness" of balancing a defendant's interest in not being burdened by successive prosecutions against the societal cost of granting such defendants immunity from reprosecution. *See United States v. Wilson*, 420 U.S. 332, 343-46 (1975). In *Sumpter v. DeGroote*, 552 F.2d 1206, 1211 (7th Cir. 1977), we noted that the *Ball* rule "[e]mbodies the Court's judgment that the societal cost of immunizing the guilty from retrial outweighs the heavy burdens that reprosecution imposes on the accused" (footnote omitted).

The general rule which emerges from *Ball* is that the successful appeal of a conviction does not bar reprosecution of the defendant on the same charge.[7] *United States v. Scott*,

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[7] *Ball* has also been interpreted to: (1) permit new theories to be added upon retrial subsequent to a reversed conviction, *United States v. Poll*, 538 F.2d 845, 847 (9th Cir.), *cert. denied*, 429 U.S. 977 (1976); *United States v. Ragano*, 520 F.2d 1191, 1196-97 (5th Cir. 1975), *cert. denied*,

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437 U.S. 82, 91 (1978); *North Carolina v. Pearce*, 395 U.S. 711, 719-21 (1969); *Green v. United States*, 355 U.S. 184, 189 (1957). This rule has been partially qualified in *Burks v. United States*, 437 U.S. 1, 18 (1978), where the Court held that when reversal is based upon the insufficiency of the evidence necessary to support the verdict against the defendant, further prosecution is precluded. *Ball* and its many progeny also stand for the proposition that one convicted of a crime may not, in the absence of a reversal or vacation of the conviction upon appeal, be reprosecuted for the same offense. *Harris v. Oklahoma, supra*, 433 U.S. at 682-83; *Brown v. Ohio, supra*, 432 U.S. at 165-67; *North Carolina v. Pearce, supra*, 395 U.S. at 717. *See United States v. Wilson, supra*, 420 U.S. at 343.

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427 U.S. 905 (1976); (2) allow the original indictment or information to be amended to include new charges not prosecuted at the first trial, *Hardwick v. Doolittle*, 558 F.2d 292, 296-98 (5th Cir. 1977), *cert. denied*, 434 U.S. 1049 (1978); and (3) permit reprosecution for a higher offense after a state appellate court has reversed a plea-bargained conviction on a lesser included offense, *United States v. Anderson*, 514 F.2d 583, 587-88 (7th Cir. 1975) (the reason for this is that the state is viewed to conditionally relinquish the right to prosecute on the greater offense only if the defendant remains convicted of the lesser offense). *Accord, United States v. Williams*, 534 F.2d 119, 121-22 (8th Cir.), *cert. denied*, 429 U.S. 894 (1976). Additionally, upon a successful appeal from a mistrial, a defendant, in certain circumstances, can be retried. *Lee v. United States*, 432 U.S. 23, 30 (1977); *United States v. Jorn*, 400 U.S. 470, 484-85 (1971) (plurality opinion). *See Arizona v. Washington*, 434 U.S. 497, 505-17 (1978); *United States v. Dinitz*, 424 U.S. 600, 611, (1976) (retrial is barred where the prosecutor provokes the mistrial). Where the defendant, in addition, himself seeks to terminate his trial prior to a determination of his guilt or innocence, an appeal by the Government from the defendant's successful efforts to do so does not violate the Double Jeopardy Clause. *United States v. Scott, supra*, 437 U.S. at 95-96.

The Supreme Court's decision in *Green v. United States*, 355 U.S. 184 (1957), is regarded as the cornerstone of double jeopardy thought. *See United States v. DiFrancesco*, . . . U.S. . . . , 101 S.Ct. 426, 432 (1980). Green had been indicted in one count charging arson and another charging him with a death attributable to the arson. The trial court instructed the jury that it could find Green guilty of arson under the first count and of either first degree murder or second degree murder under the second count.[8] Under the applicable statutes, second degree murder involved life imprisonment while a first degree murder conviction could bring the death penalty. Second degree murder, therefore, represented a lesser included offense of first degree murder. *Id.*, 355 U.S. at 185-86. Green was found guilty of arson and of second degree murder. The jury did not specifically pronounce a verdict upon the first degree murder count. The State, upon remand from Green's successful appeal of his second degree murder conviction, used the new trial as an opportunity to reprosecute the first degree murder charge. This time, the jury adjudged Green guilty of first degree murder. Again Green appealed. The Court held that the reprosecution of Green for first degree murder was violative of the Double Jeopardy Clause. *Id.*, 355 U.S. at 198. The Court interpreted the jury's silence on the first degree murder charge in the first trial as an implicit acquittal, and also noted that the jury was dismissed without Green's consent and only after he had been

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[8] Although both first and second degree murder were brought under one count, the Court treated them as separate offenses. In justification of this treatment, the Court noted, 355 U.S. at 190 n.10:

> "In substance the situation was the same as though Green had been charged with these different offenses in separate but alternative counts of the indictment. The constitutional issues at stake here should not turn on the fact that both offenses were charged to the jury under one count."

placed in jeopardy on that charge. *Id.*, 355 U.S. at 190-96. Both observations constituted grounds for finding a violation of the Double Jeopardy Clause. *Id.* The prosecution contended that in order for Green to secure the reversal of his second degree murder conviction, he was required to waive his valid defense of former jeopardy not only for that offense, but also for the first degree murder charge, for which he was not convicted and which was not involved in the appeal. *Id.*, 355 U.S. at 193. The Court, in rejecting his argument, stated:

> The law should not, and in our judgment does not, place the defendant in such an incredible dilemma. Conditioning an appeal of one offense on a coerced surrender of a valid plea of former jeopardy on another offense exacts a forfeiture in plain conflict with the constitutional bar against double jeopardy.

Id., 355 U.S. at 193-94. *See Benton v. Maryland*, 395 U.S. 784,796 (1969). Further, in *Abney v. United States*, 431 U.S. 651, 660-62 (1977), the Court restated the proposition that the primary purpose of the Double Jeopardy Clause is to prohibit successive exposure to the rigours of trial.

Forcing Wilson to undergo a second prosecution for felony murder placed him in a related situation feared by the Court in *Green* and *Abney*. It is clear that jeopardy had attached as to the felony murder count. *See Serfass v. United States*, 420 U.S. 377, 391-92 (1975). No appeal of Wilson of the intent count reactivated the felony count's viability for retrial. The State's arguments ignore what actually occurred. Two convictions for two distinct counts of murder under the same Illinois murder statute were returned. The State, realizing as well as conceding that no conviction or sentence could be entered on both, selectively *nolle prossed* one of the two — the felony murder count.

Controversy exists as to both the reasons for and the impact of this *nolle prosequi* motion. The State submits that it was "more likely" that the *nolle* motion represented an effort to make a redundant verdict disappear, to clear up the record, and to prevent prejudice to Wilson. That conclusion is derived directly from a holding of an Illinois court which had previously reviewed Wilson's third trial. *People v. Wilson*, 61 Ill. App. 3d 1029, 378 N.E.2d 378, 380 (5th Dist. 1978). The State also avers that the overall effect of the grant of its *nolle prosequi* motion was to aid Wilson "by eliminating potentially prejudicial matters from records that might eventually be considered by parole authorities and by eliminating the need to appeal from an improper 'felony murder' judgment and sentence."

It is, however, equally "likely" that the reasons for the State's motion were threefold: (1) to attempt to compensate for its choice of initially indicting Wilson in two counts of murder under two different theories, given that murder is but one crime in Illinois; (2) to prevent *any* potential double jeopardy question from arising as to sentencing for the felony murder count as well as under the separate count related to the felony itself; and (3) to allow greater, cumulative, or consecutive sentencing of Wilson, since he could be sentenced consecutively under an intent murder count and for the underlying felony of attempt burglary, *see Gore v. United States*, 357 U.S. 386 (1958); *Bell v. United States*, 349 U.S. 81 (1955). This speculation is supported by reference to a statement made at Wilson's second trial where the court noted:

> The State, in taking the murder charge, got the benefit of a consecutive sentence, which they couldn't have had if they had gone the other route. If they had gone the felony-murder route, they couldn't have gotten consecutive sentencing. There

> is no question about that. I'm sure that's why they nolled the one and took the other.

Record at 57.

The impact, however, not the motivation behind the State's act to *nolle prosequi* the felony murder count is what is important. We view the effect of that action as amounting to an indication by the State that it would no longer prosecute or proceed against Wilson on the felony murder count. Thus, all that remained after the *nolle* were separate guilty verdicts for the intent murder count and for the attempt burglary count.[9]

The State relies upon the fact that our prior decision permitted it to "[r]etry the petitioner on the murder charge." *United States ex rel. Wilson v. Warden Cannon, Stateville Penitentiary, supra*, 538 F.2d at 1278. The State urges that since the decision placed no limitations upon which murder theories were applicable at retrial, all theories remained

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[9] The State conceded at oral argument that if a prosecutor had *nolle prossed* a single crime after jeopardy had attached, such as embezzlement, no subsequent prosecution whatsoever would have been permitted. The State argues that the fact that felony murder is one theory of murder in Illinois and that Wilson's appeal and reversal on the intent murder theory allegedly wiped the slate clean so as to permit retrial on felony murder served to distinguish this case from the norm — *e.g.* embezzlement. Our view is otherwise. Here, no difference exists between a *nolle* of a single crime and a *nolle* of a separate and distinct count of murder which included one theory of the crime.

The State, in addition, makes much of Wilson's failure to object to the *nolle* motion, almost implying that his failure should preclude objection at a later date. We cannot agree. No defendant should be expected to object to action by a prosecutor which effectively terminates judicial consideration of a conviction.

viable. We cannot agree.[10] All that was before us was an appeal by Wilson of his intent murder conviction based upon, *inter alia*, the use by the State of perjured testimony. The conviction under the felony murder count — a separate count — was not before us.

The district court, viewing murder as one crime in Illinois with different theories, wrongly concluded that Wilson himself was the one who received a second chance and that it would be contrary to the policies underlying the Double Jeopardy Clause to permit him to escape conviction due to a "procedural quirk which has not harmed [Wilson] in any way."[11] *Wilson v. Meyer, supra*, R.A. at 133. There is strong suggestion in the record that the purpose behind the State's *nolle* motion was reasoned action, rather than a mere quirk. Further, Wilson suffered definite prejudice. The *nolle prosse* precluded any appellate review of the guilty verdict on the felony murder count, even if Wilson had desired to pursue such a course. If Wilson's felony murder conviction had been determined on appeal to have been based upon insufficient

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[10] The State's argument here is founded upon its own view of the effect of our decision, rather than anything which can be fairly derived from the decision itself. Interestingly, the State argued below that this court intimated no view on whether Wilson might be retried for felony murder. Record at 171.

[11] We also disagree with the conclusion of the Illinois court that no double jeopardy violation existed because the two verdicts on the two counts, in effect merged into a single judgment of murder. *People v. Wilson, supra*, 378 N.E.2d at 380. This conclusion, cited by the State here as controlling, ignores what actually occurred. Wilson was indicted on two theories of murder under two counts and was adjudged guilty on each. Only then did the State *nolle prosse* the felony murder count. All that remained was the intent murder count. Thus, it cannot be said that the two verdicts merged into a single judgment, as only one verdict remained, with nothing whatsoever to merge with.

evidence, clearly no reprosecution could have been permitted. *Burks v. United States, supra*, 437 U.S. at 18. The abandonment of prosecution by the State of the felony murder count effectively foreclosed Wilson from exploring that avenue upon appeal.

The State attempts to utilize *Ball* and its progeny in order to justify the retrial of Wilson for felony murder. The State contends, and the district court agreed, that because murder is one crime in Illinois the reversal of the intent murder conviction "wiped the slate clean." Since the original felony murder count, however, did not remain viable subsequent to Wilson's first trial, *Ball* and its many progeny are inapplicable.[12] Further prosecution of the count should have been barred. Under *Green v. United States, supra*, 355 U.S. at

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[12] The *Ball* rule, which permits a retrial upon reversal of a conviction, has been explained on two alternative theories which state that the defendant either waives his double jeopardy claim by his appeal, or that the first jeopardy continues until he is acquitted or his conviction becomes final. *United States v. Wilson, supra*, 420 U.S. 343-44 n.11; *Sumpter v. DeGroote, supra*, 552 F.2d at 1210 n.14. *See United States v. Tateo*, 377 U.S. 463, 465-66 (1964); *Green v. United States, supra*, 355 U.S. at 189. Under either theory, our facts are distinguishable. Wilson did not appeal the original separate felony murder conviction. Nor can jeopardy be viewed here as continuing since it was the State itself which *nolle prossed* the count.

Furthermore, we note that the decisions which permit, without double jeopardy attaching, appeal from orders arresting judgments after verdicts have been entered against a defendant are not controlling. *United States v. Bramblett*, 348 U.S. 503 (1955). *See, e.g., United States v. Wilson, supra*, 420 U.S. at 344-45. In those cases, no second trial was required since a reversal merely necessitated that the jury verdict of guilty be reinstated. *Id.; United States v. Ramos*, 558 F.2d 545, 546 (9th Cir. 1977). Here, it was the State which *nolled* the felony murder count, not the court, upon Wilson's motion, arresting a judgment after conviction.

193-94, and *Benton v. Maryland, supra*, 395 U.S. at 796, Wilson should not be required to waive his valid claim of former jeopardy as to the *nolle prossed* felony murder count in order to secure reversal of his conviction under a separate intent murder count.[15] That is true even considering that murder is one crime in Illinois. Moreover, the *Ball* rule is not applicable here, as the reprosecution of Wilson for felony murder violated the "sound principles of justice" upon which the rule is based. *See United States v. Wilson, supra*, 420 U.S. at 344, 352; *United States v. Tateo, supra*, 377 U.S. at 466-68; *Sumpter v. DeGroote, supra*, 552 F.2d at 1210-13 (and the cases cited therein).

In addition, the State submits that the reinstatement of the felony murder count *may* be viewed as affording it the opportunity to either pursue a new theory, *citing, United States v. Ragano, supra*, 520 F.2d at 1191, and *United States v. Poll, supra*, 538 F.2d at 845, or amend the original charges, *citing, Hardwick v. Doolittle, supra*, 558 F.2d at 292. The State's reliance on these cases is misplaced. *Ragano* and *Poll* involved successful attempts by the government to prosecute the defendants for different statutory offenses or theories after the respective reversals of other separate charges upon appeal. *Id.*, 538 F.2d at 847; 520 F.2d at 1197-98. *See United States v. Ewell*, 383 U.S. 116, 124-25 (1966). In *Doolittle*, after reversal on two original counts, the prosecutor obtained a subsequent indictment which charged the defendant with two additional counts not charged in the original indictment. The Fifth Circuit affirmed the denial of the defendant's habeas petition

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[15] This conclusion is derived in part from considerations of the equities and other circumstances involved herein and is not based upon a "mechanical application of an abstract formula" to resolve this novel double jeopardy issue, which is forbidden. *Wade v. Hunter*, 336 U.S. 684, 691 (1949).

stating that prosecution and trial on the added counts did not result in invocation of double jeopardy protection because the new counts were not the same offense as the original counts and thus, as to the new counts, the defendant was only placed in jeopardy once. *Id.*, 558 F.2d at 296-98. In those three decisions, in direct contrast to Wilson's case, the new theory, offense or count had *not* been charged or prosecuted in the original trial. The later additions were allowed in part because the Double Jeopardy Clause did not necessarily require a prosecutor to join in a single proceeding all possible charges against a defendant. *See Ashe v. Swenson*, 397 U.S. 436, 445-57 (1970) and 397 U.S. 448-60 (Brennan, J., concurring). Joinder is also permitted in light of the general rule that if a conviction is reversed, the slate is usually wiped clean and the defendant may then be prosecuted for a different statutory violation regardless of whether it is classifiable as the same or as a separate offense. *United States v. Poll, supra*, 538 F.2d at 847. *See Bretz v. Crist*, 546 F.2d 1336, 1340-46 (9th Cir. 1976), *aff'd*, 437 U.S. 28 (1978). That, however, is not the present case.

III.

We hold that the retrial of Wilson for murder under a felony murder count or theory constituted a violation of the Double Jeopardy Clause. It was the retrial for felony murder under the felony murder count or theory and not that of intent murder which provided Wilson with a significant double jeopardy claim. Nothing requires that Wilson's double jeopardy claim be extended to protect him from murder prosecution under any other theory or count. The intent murder count continues to be viable, having remained so through our reversal in 1976, the mistrial in Wabash County, and the Williamson County proceedings currently on review herein.

We reverse and remand for proceedings consistent with this opinion on the condition that the writ shall issue and Wilson be discharged unless retried under the intent murder count within a reasonable time to be determined by the district court.[14] Any retrial must be without recourse to the felony murder theory or count.

REVERSED AND REMANDED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

[14] All other arguments which have been raised herein have been considered and have been found to be without merit.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA,
ex rel CLARENCE EUGENE WILSON,

Petitioner,

-vs-

LEO J. MEYER, ET AL.,

Respondents.

Civil No. 79 2285

ORDER

On September 29, 1978, petitioner, Clarence Eugene Wilson filed a Petition for Writ of Habeas Corpus claiming several violations of his constitutional rights. On July 13, 1979, respondent moved to dismiss the Petition for failure to state a claim upon which relief can be granted or, in the alternative, respondent moved for summary judgment.

The facts and circumstances surrounding this Petition are numerous and have a long history. Petitioner was arrested in connection with a 1970 attempted burglary of a local grocery in which Oblong, Illinois Police Chief Jack Fancil was shot and killed. In August, 1970, petitioner was tried and convicted in the Circuit Court of Wayne County, Illinois, of intent murder, felony murder and attempted burglary. The prosecution *nolle prossed* the felony murder count before sentencing and the petitioner was sentenced on the remaining two counts.

After a direct appeal to the Illinois Courts and petitions for post-conviction release, both in state and federal courts, the United States Court of Appeals for the Seventh Circuit in *United States ex rel Wilson v. Warden Cannon, Stateville Penitentiary*, 538 F.2d 1272 (7th Cir. 1976) upheld the burglary conviction but on the basis of the use of perjured testimony, the murder conviction was vacated and the State of Illinois was given a reasonable time to retry him on the murder charge.

The intent murder indictment was reinstated and a new indictment was secured for murder in the course of attempting to commit a felony which is a felony murder theory.[1] In 1977, the Circuit Court of Wabash dismissed the "felony murder" indictment without explanation and later declared a mistrial because a jury could not agree on a verdict.

In February of 1977, venue was transferred to Williamson County and that Court reinstated the "felony murder" indictment. The jury this time returned a general verdict of guilty.

In his Petition for a Writ of Habeas Corpus, petitioner alleges that several of his constitutional rights have been violated in that:

I. Petitioner was placed in double jeopardy when he was retried and convicted on a "felony murder" indictment after the "felony murder" indictment had been *nolle prossed* after the August, 1970 trial and was again dismissed in Wabash County in 1977.

II. The prosecution withheld from petitioner's counsel material evidence consisting of the pre-trial statements of Terry Goodwin and Wendel Newcomb and the clothing the petitioner was allegedly wearing at the time of the crime.

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[1] The Illinois Statutes do not use the term felony murder.

III. Petitioner's conviction was obtained through the use of the perjured testimony of several of the witnesses.

IV. The judge who presided over the 1977 Williamson County trial was biased and failed to recuse himself at petitioner's request.

V. Petitioner alleges that he was not afforded adequate representation due to the incompetence of counsel.

VI. Petitioner was placed in double jeopardy when he was given consecutive sentences for his attempted burglary and murder conviction.

This Court will attempt to discuss each and every issue in an orderly fashion.

I. PETITIONER'S ALLEGATIONS OF DOUBLE JEOPARDY RELATING TO THE 1970 *NOLLE PROSEQUI* AND THE 1977 DISMISSAL OF THE INDICTMENT.

Petitioner contends that the *nolle prosequi* of the "felony murder" count, after his conviction, bars his retrial on the same theory. The test to be used for determining a double jeopardy violation was set out in the United States Supreme Court decision of *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 182 (1932):

> "The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not."

The prosecution of petitioner for attempted burglary and "felony murder" could violate the double jeopardy clause according to the *Blockburger* test because in order to prove "felony murder" there must be a felony *plus* a killing of an in-

dividual in the commission of that felony so each crime does not require proof of a fact which the other does not. The courts have held that prosecution for a similar set of offenses could violate the double jeopardy clause of the United States Constitution. *Harris v. Oklahoma*, 433 U.S. 682, 97 S.Ct. 2912 (1977); *Ex Parte Neilson*. 131 U.S. 176, 9 S.Ct. 672 (1889).

This Court faces a somewhat different set of circumstances. The United States Court of Appeals for the Seventh Circuit vacated his murder conviction based on the intent murder indictment and ordered his retrial on that murder conviction. Since petitioner appealed his murder conviction, he has exposed himself to the retrial of the issues concerning the conviction without the right to invoke the protection of the double jeopardy clause. *United States v. Wilson*, 420 U.S. 332, 95 S.Ct. 1013, (1975); *Green v. United States*, 355 U.S. 184, 78 S.Ct. 221 (1957); *United States v. Ball*, 163 U.S. 662, 16 S.Ct. 1192, (1896).

Petitioner, though, contends that the *nolle prosequi* of the "felony murder" count eliminates the theory from reconsideration so when the Seventh Circuit vacated his murder conviction, the State could try petitioner on the theory of intent murder but not "felony murder". This Court disagrees.

Under Illinois Revised Statutes, Chapter 38, Section 9-1(a), the theories of "felony murder" and "attempted murder" all fall under the classification of murder and are not separate crimes. *People v. Allen*, 56 Ill.2d 536, 309 N.E.2d 544 (1974). So the Seventh Circuit in vacating the murder conviction exposes the petitioner to retrial for the crime of murder which includes by definition all theories. Petitioner treats each subpart as a distinct crime when they are on different theories which fall within the definition of the crime of murder. If petitioner had been tried under Section 9-1(a)(1) and was then acquitted, he could not have been tried again under Sec-

tion 9-1(a)(2) or Section 9-1(a)(3), since he would have been acquitted of the offense of murder, but the retrial of petitioner after the vacating of his murder conviction exposes him to the different theory of murder due to the definition of murder under Illinois law. This statute is therefore a two edged sword.

If we examine the policy behind the double jeopardy clause, it is hard to see where petitioner's rights have been violated by his retrial on the "felony murder" theory:

> "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." *Green v. United States*, 355 U.S. 184, 187, 188; 78 S.Ct. 221, 223 (1957).

The prosecution has not been given a second chance to convict petitioner for he was convicted at the first trial and only exposed himself to a new trial when he appealed his murder conviction. Petitioner is the one that received the second chance in this instance and it would be unjust and contrary to the policy behind the double jeopardy clause to allow the petitioner to escape conviction due to a procedural quirk which has not harmed the petitioner in any way.

Petitioner also argues that the dismissal for the "felony murder" count in the 1977 trial in Wabash County bars his retrial or the "felony murder" count in the subsequent trial in Williamson County. The judge in Wabash County did dismiss the count but without explanation. The dismissal of the count

notwithstanding, the jury could be instructed on "felony murder" under most circumstances due to the definition of the crime of murder. *People v. Allen*, 56 Ill.2d 536, 309 N.E.2d 544 (1974); *People v. Rosochacki*, 41 Ill.2d 483, 244 N.E.2d 136 (1969). The dismissal without explanation did not bar a jury instruction on "felony murder" and so the theory was a viable one up to the end of the trial. A mistrial due to the failure of the jury to agree on a verdict does not bar the retrial of the defendant because the mistrial was dictated by "manifest necessity" or the "ends of public justice." *United States v. Sanford*, 429 U.S. 14, 97 S.Ct. 20, (1976); *Illinois v. Somerville*, 410 U.S. 458, 93 S.Ct. 1066 (1973); *United States v. Perez*, 9 Wheat. 579 (1824). Since the "felony murder" theory was a viable one all through the trial, despite the dismissal of the count, then the dismissal and subsequent mistrial due to a hung jury will not bar his retrial on the charge of murder. Therefore, petitioner was not placed in double jeopardy by the dismissal of the felony count and the subsequent 1977 retrial in Williamson County.

II. THE ALLEGED WITHHOLDING OF MATERIAL EVIDENCE BY THE PROSECUTION.

Petitioner alleges that the prosecution withheld the pretrial statements of Terry Goodwin and Wendel Newcomb, who were eyewitnesses to the crime, and the clothing worn by petitioner the night of the crime. Petitioner feels this evidence is necessary to show that he did not actually shoot Chief Fancil. The State claimed the statements, if they ever existed, petitioner's clothing, and the murder weapon were lost. Respondent contends that even if the petitioner's allegations were true, then it only goes to the proof of intent murder and there is still enough evidence to support a verdict on the basis of the felony murder theory since a general verdict was rendered by the jury. The authority seems to be to the contrary.

The judgment was based on a general verdict in which it cannot be determined whether the jury determination was based on unconstitutional grounds. The validity of one count of a general verdict notwithstanding, if one of the grounds for a conviction may have been unconstitutionally based then the verdict must fall. *Williams v. State of North Carolina*, 317 U.S. 287, 63 S.Ct. 207 (1942); *Yates v. United States*, 354 U.S. 298, 77 S.Ct. 1064 (1957). Since the jury could have convicted petitioner on intent murder, which may have been tainted by constitutional violations by the prosecution, then this Court must look at the substance of all his allegations including the ones relating to the withholding of evidence.

Under *Brady v. State of Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196, 1197 (1963), "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Consequently, this Court must determine if the withheld evidence is material to showing the guilt of petitioner but according to the Seventh Circuit, this Court should be less willing to hold the failure to produce some evidence immaterial if this failure was not in good faith. *United States v. Esposito*, 523 F.2d 242 (7th Cir. 1975).

The clothing was lost along with the murder weapon and this failure to produce cannot be viewed as bad faith. No one could predict that the evidence would be needed five years after the petitioner exhausted his direct state appeals. The state also lost evidence favorable to its case, i.e., the murder weapon. As to the statements, no one is sure if they existed at all and so the prosecution is being asked to produce possibly non-existent statements. The State cannot produce what it doesn't have. Under the circumstances, the State's failure to produce cannot be viewed as bad faith and so this court is less willing to hold this failure to produce as material.

Terry Goodwin thought the person who did the shooting wore light clothes. There was evidence that Jim Sharp wore light clothes. The clothing may have provided additional support to the defense, but how much support, if any, is uncertain. This Court fails to see how the clothing is so material as to warrant the overturning of the conviction.

Petitioner feels that the statements made by Newcomb and Goodwin would have supported his defense. The existence of the statements have been called in question and the only reference to them was made by a police officer who has since died. This Court has no assurance that the statements existed and, if made, were any different from the ones defense counsel were given before trial. Petitioner's allegations are simply conjecture and speculation which cannot support a finding of materality. Petitioner does not know what was contained in the statements, if they existed at all, and to find error for the failure to produce statements that the petitioner does not have an inkling of what they contain would be unduly burdening the State in the prosecution of their criminal cases. "The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial does not establish 'materiality' in the constitutional sense." *United States v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392 (1976).

III. POSSIBLE CONSTITUTIONAL VIOLATIONS DUE TO USE OF PERJURED TESTIMONY BY THE STATE.

Petitioner alleges numerous instances of perjury during his 1970 trial and 1977 trial. Petitioner feels that the State allowed false testimony to be introduced and the State paid for testimony.

The presentation of false testimony alone is not enough to trigger the constitutional protection without the State's know-

ing use of such testimony or at the very least the State allowing it to go uncorrected. *Napue v. People of the State of Illinois*, 360 U.S. 264, 79 S.Ct. 1173 (1959); *Mooney v. Holohan*, 294 U.S. 103, 55 S.Ct. 340 (1935); *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763 (1972); *United States ex rel Williams v. Walker*, 525 F.2d 383 (7th Cir. 1976).

> "A new trial is required if 'the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury' *Napue*, *supra* at 271, 79 S.Ct. at 1178." *Giglio v. United States*, 405 U.S. 150, 154, 92 S.Ct. 763, 766 (1972).

Petitioner has made numerous allegations which are vague and seem to be unsupportable. It is hard for the Court to distinguish the perjury committed during the trial in 1970 from the perjury allegedly committed in the trial held in 1977. He has made bald allegations of state involvement without offering any support for his allegations. The Courts have an obligation to grant an evidentiary hearing under some situations but not upon "a frivolous and incredible allegation of newly discovered evidence". *Townsend v. Sain*, 372 U.S. 293, 317, 83 S.Ct. 745, 759 (1963). See also: *U.S. ex rel Williams v. Walker, supra; Burks v. Egeler*, 512 F.2d 221 (6th Cir. 1975). Petitioner's allegations simply fail to make even a bare showing of State involvement or that such testimony could have affected the outcome of the trial. Therefore this Court cannot afford relief to the petitioner on the basis of perjured testimony.

IV. THE WILLIAMSON COUNTY JUDGE'S BIAS VIOLATED PETITIONER'S CONSTITUTIONAL RIGHTS.

Petitioner alleges that the failure of the judge to recuse himself, his various actions during the trial, and comments

made during sentencing show a bias against the petitioner. Respondent admits that the judge's failure to recuse himself constitutes a violation of Illinois Revised Statutes, Chapter 38, Section 114-5 but petitioner never alleged this violation on appeal. Without the showing of some prejudice, the violation of a state statute does not rise to a constitutional violation and so this Court does not have the authority to review the alleged violations. The Courts can only grant habeas corpus relief under 28 U.S.C. 2254 on the basis of a claim made by a state petitioner where he is being held in "custody in violation of the Constitution or laws or treaties of the United States." *Brown v. Allen*, 344 U.S. 443, 73 S.Ct. 397 (1953); *Scalf v. Bennett*, 408 F.2d 325 (8th Cir. 1969). Petitioner had an absolute right to a new judge under Illinois law. *People v. Peter*, 55 Ill.2d 443, 303 N.E.2d 398 (1973); *People v. Wilson*, 37 Ill.2d 617, 230 N.E.2d 194 (1967). The mere failure to recuse himself, though, did not prejudice the petitioner and so does not rise to a violation of petitioner's constitutional rights, it is a strictly state matter.

Petitioner points to the judge's various rulings during the trial and his comments during sentencing in an attempt to show bias on the part of the judge. The judge's comments during sentencing are clearly permissible for it occurs after guilt was determined. His comments do not indicate a predisposition against the petitioner before and during the trial. His rulings were based on his judgment and the fact that he may have made a bad ruling does not show bias against the defendant. "Trial before an 'unbiased judge' is essential to due process." *Johnson v. Mississippi*, 403 U.S. 212, 216, 91 S.Ct. 1778, 1778, 1780 (1971). Petitioner has failed to show a bias which constitutes a violation of due process clause of the Fourteenth Amendment.

V. PETITIONER'S COUNSEL WAS INCOMPETENT.

Petitioner stated that his defense counsel failed to understand the offense of the "felony murder" charge, was inexperienced, and was working on civil cases at the time. The proper standard to be used in determining the competency of counsel as announced by the U.S. Court of Appeals for the Seventh Circuit in *U.S. ex rel Williams v. Twomey*, 510 F.2d 634, 640 (7th Cir. 1975), is that legal counsel was incompetent if he performed:

> "... sufficiently short of the expected professional standard of competent counsel ..."

Whenever the competency of counsel is challenged then the Court must start with the presumption that counsel was competent and that the burden is on the defendant to show otherwise. *Matthews v. United States*, 518 F.2d 1245 (7th Cir. 1975). Petitioner pointed to the effort put forth by counsel in the defense of this case and the defense counsel's use of cross-examination in eliminating inconsistencies in witnesses' testimony. Defense counsel may have been inexperienced or had made some strategic and tactical errors in the trial but this is not enough to constitute constitutional error. *U.S. ex rel Williams v. Twomey, supra.* Petitioner's counsel has certainly met the professional standard set out by the Seventh Circuit so this Court can see no violation of petitioner's right to counsel.

VI. THE CONSECUTIVE SENTENCES IMPOSED VIOLATED THE DOUBLE JEOPARDY CLAUSE.

Petitioner's sentences for attempted burglary and murder are to be served consecutively and petitioner contends this constitutes double jeopardy. This allegation was only first raised last May. While petitioner's claim may have merit, this Court must decline to rule on this issue for petitioner has

failed to exhaust the State remedies. The Illinois Supreme Court in *People v. Wilson*, 51 Ill.2d 302, 281 N.E.2d 626 (1972) reviewed petitioner's contentions that the consecutive sentences imposed by the judge in the 1970 trial were impermissible but the sentencing in that instance was based on a different set of circumstances. Petitioner, in 1970, was found guilty on separate counts and sentenced on the intent murder count and the attempted burglary count. In the 1977 Williamson County trial, a general verdict was rendered and the basis of the verdict is unclear so there is a possibility that the petitioner was convicted on the basis of "felony murder". Therefore, the present situation is clearly different from the one presented to the Illinois Supreme Court in 1972. The exhaustion of State remedies is a prerequisite to this Court's consideration of an issue presented in a habeas corpus petition under 28 U.S.C. 2254. *Pitchess v. Davis*, 421 U.S. 482, 95 S.Ct. 1748 (1975); *Picard v. Connor*, 404 U.S. 270, 92 S.Ct. 509 (1971); *U.S. ex rel Wilson v. Rowe*, 454 F.2d 585 (7th Cir. 1971). Consequently, this Court must decline to review the merits of this issue.

Accordingly, the respondent's motion for a summary judgment is hereby allowed.

IT IS SO ORDERED.

DATED: This 27 day of June, A.D. 1980.

W.L. Beatty

UNITED STATES DISTRICT JUDGE

APPENDIX C
OPINION OF APPELLATE COURT OF ILLINOIS

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61 Ill.App.3d 1029
18 Ill.Dec. 914

PEOPLE of the State of Illinois,
Plaintiff-Appellee,

v.

Clarence Eugene WILSON,
Defendant-Appellant.

No. 77-416.

Appellate Court of Illinois,
Fifth District.

July 10, 1978.

On retrial following mistrial, defendant was convicted in the Circuit Court, Williamson County, William A. Lewis, J., of murder, and he appealed. The Appellate Court, Karns, J., held that: (1) when defendant's conviction for murder was vacated by United States Court of Appeals, prosecution was entitled to retry defendant for murder, under any of three theories set out in statute defining murder, notwithstanding that prosecution had nolle prossed "felony murder" count following first conviction; (2) court did not err in submitting to jury only general verdict of guilty or not guilty of murder, and (3) order dismissing "felony murder" indictment was in fact a premature ruling that jury would not be instructed on felony-murder theory, and as such order was not appealable.

Affirmed.

1. Criminal Law — 178

When defendant's conviction for murder was vacated by the United States Court of Appeals, prosecution was entitled to retry him for murder, under any of the three theories set out in statute defining murder, notwithstanding that prosecution had nolle prossed "felony murder" count following murder conviction. S.H.A. ch. 38, § 9-1(a).

2. Homicide — 308(2)

Trial court did not err in submitting to jury only general verdicts of guilty or not guilty of murder where defendant was prosecuted under both murder and "felony murder" indictments. S.H.A. ch. 38, § 9-1(a).

3. Homicide — 289

Since "felony murder" is only a theory of prosecution, a jury can be instructed on it if it is supported by the evidence and defendant is not unfairly surprised, even if that theory was not specifically charged in the indictment or information. S.H.A. ch. 38, § 9-1(a).

4. Criminal Law — 1024(1)
Indictment and Information — 15(1)

Order dismissing "felony murder" indictment was in fact a premature ruling that jury would not be instructed on felony-murder theory of prosecution, and as such was not appealable, and State was not precluded by failure to appeal from reindicting defendant on that theory when case was transferred to another county after mistrial. S.H.A. ch. 38, § 9-1(a); Supreme Court Rules, rule 604, S.H.A. ch. 110A, § 604.

James A. Klenk, Chicago, for defendant-appellant.

Raymond McCamy, State's Atty., Robinson, William J. Scott, Atty. Gen. of the State of Illinois, Donald B. Mackay, Thomas Connors, Asst. Attys. Gen., Chicago, for plaintiff-appellee.

KARNS, Justice.

In May, 1977, Clarence Wilson was convicted of murder following a jury trial in the Circuit Court of Williamson County and was sentenced to a term of 50 to 75 years. Because of the nature of his allegations on appeal, it is necessary to set out in some detail the chronology of the legal proceedings which led to this conviction.

On June 1, 1970, the defendant and two accomplices, James Sharp and Donald Mitchell, attempted to burglarize a supermarket in Oblong. They were interrupted in this activity by the police chief of Oblong and the officer was fatally shot.

In August, 1970, defendant was tried in the Circuit Court of Wayne County on charges of murder, murder while attempting to commit burglary, and attempt to commit burglary. The jury returned guilty verdicts on all three counts but the court, for reasons which will be explained below, entered judgments of conviction only for murder and attempt to commit burglary. Defendant took a direct appeal to our supreme court and his convictions were affirmed. (*People v. Wilson*, 51 Ill.2d 302, 281 N.E.2d 626 (1972).)

Defendant then filed a petition for post-conviction relief, alleging that his convictions were obtained in violation of *Napue v. Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959), because Sharp and Mitchell had falsely testified at his trial that they had received no consideration for their testimonies and the prosecutor had failed to correct this false testimony. Following a hearing, the trial court denied the

relief sought and we affirmed this denial in *Wilson v. People*, 13 Ill.App.3d 675, 300 N.E.2d 576 (5th Dist. 1973).

Defendant then filed a habeas corpus petition in federal district court and the relief was denied. The United States Court of Appeals for the Seventh Circuit, however, reversed and vacated defendant's murder conviction. The attempted burglary conviction was not disturbed. The Court of Appeals ordered the district court to fix a reasonable period of time within which the State could retry defendant for murder. (*United States ex rel. Wilson v. Cannon*, 538 F.2d 1272, 1278 (7th Cir. 1976).) The district court ordered that defendant be tried by January 24, 1977.

The State reinstated the murder indictment in September, 1976. In November, it secured a new indictment for murder in the course of attempting to commit burglary, sometimes known as "felony murder." Prior to trial in the Circuit Court of Wabash County, defendant moved to dismiss the felony murder indictment on the ground that it violated his constitutional and statutory guarantees against double jeopardy. The motion was granted and defendant was tried for murder. A mistrial was declared on January 14, 1977, because the jury could not agree on a verdict.

On January 21, the State moved the federal district court to grant an additional 120 days within which to try the defendant. Defendant objected and the court allowed an additional 90 days, or until April 21, in which to try Wilson.

In response to defendant's motion, venue was transferred to Williamson County and trial was set for April 18, 1977. The State moved to reinstate the felony murder charge. Following a hearing the trial court denied the motion. A week later the trial judge reconsidered and granted the motion. Therefore trial was held on both murder and "felony murder" indictments. Over defendant's objection the jury was instructed

that it should return a general verdict of guilty if it found defendant guilty of either charge. The jury returned a verdict of guilty on April 22, 1977.

Defendant's first contention on appeal is that he was unconstitutionally placed in double jeopardy when he was indicted for "felony murder" and convicted in 1977 because the State had *nolle prossed* the original 1970 "felony murder" indictment after a guilty verdict had been returned. We disagree.

When the jury returned guilty verdicts to both the murder and "felony murder" charges, the State, apparently believing that judgment could not be entered on both, moved to *nolle prosequi* the "felony murder" count and the motion was granted. Although the State in its brief to this court suggests that the parties in 1970 were relying on *People v. Schlenger*, 13 Ill.2d 63, 147 N.E.2d 316 (1958), and the record neither supports nor contradicts this suggestion, we do not believe that *Schlenger* was applicable. *Schlenger*, and the numerous cases following prior to *People v. King*, 66 Ill.2d 551, 6 Ill.Dec. 891, 363 N.E.2d 838 (1977), (*see e. g. People v. Scott*, 43 Ill.2d 135, 251 N.E.2d 190 (1960); *People v. Stewart*, 45 Ill.2d 310, 259 N.E.2d 24 (1970); *People v. Williams*, 60 Ill.2d 1, 322 N.E.2d 819 (1975) stood for the proposition that judgment could only be entered on the more serious of two offenses arising from the same act or course of conduct where the acts or conduct were not separately motivated. Inasmuch as murder and "felony murder" are in fact the same crime, as will be explained below, it is more likely that the State in 1970 was attempting to make a redundant verdict disappear. The fact that a redundant verdict existed at all resulted from the submission of separate verdicts on each rather than submitting general verdicts of guilty or not guilty of murder.

"Felony murder" is not a crime found in our statutes. As defendant concedes, the phrase is a shorthand manner for ex-

pressing a theory by which murder may be prosecuted. The crime of murder is described in section 9-1 of the Criminal Code as follows:

> "(a) A person who kills an individual without lawful justification commits murder if, in performing the acts which cause the death:
>
> (1) He either intends to kill or do great bodily harm to that individual or another, or knows that such acts will cause death to that individual or another; or
>
> (2) He knows that such acts create a strong probability of death or great bodily harm to that individual or another; or
>
> (3) He is attempting or committing a forcible felony other than voluntary manslaughter."
>
> (Ill.Rev.Stat.1975, ch. 38, par. 9-1(a)).

Thus there is but one crime of murder, not three separate and distinct offenses. (*People v. Allen*, 56 Ill.2d 536, 543, 309 N.E.2d 544, 547, *cert den.* 419 U.S. 865, 95 S.Ct. 120, 42 L.Ed.2d 102 (1974).) As noted in *Allen*, the subparagraphs of section 9-1(a) describe mental states or conduct which must accompany the act which causes death. They do not describe separate crimes but the single crime of murder. Although the State was entitled to prosecute its case on both theories, the court and counsel in the 1970 Wayne County trial believed that judgment and sentence could not be imposed for both murder and "felony murder." Faced with the problem of how to dispose of the "felony murder" count after the verdict had been returned, the State decided to *nolle prosequi* the charge. In so doing, the State attempted to clear up the record and prevent prejudice to the defendant.

[1] We do not believe that *nolle prossing* the "felony murder" count actually had any effect, much less a double

jeopardy implication. That count was redundant after the verdicts were returned because it represented merely another theory of murder. In effect, the two verdicts can be viewed as having merged into a single judgment of murder. When defendant's conviction was vacated by the federal court the prosecution was entitled to retry him for murder, under any of the three theories set out in section 9-1(a).

[2] For similar reasons we reject defendant's contention that the Williamson County trial court in the 1977 case erred in submitting to the jury only general verdicts of guilty or not guilty of murder. The propriety of a general verdict is underscored by the confusion generated in the 1970 trial by the submission of verdicts on both "intentional murder" and "felony murder."

Defendant's third and final contention is that because the State failed to appeal the Wabash County dismissal of the "felony murder" indictment, it was precluded from reindicting him on that theory when the case was transferred to Williamson County after the mistrial in Wabash County. Defendant's motion to the court in Wabash County was based on the double jeopardy issue argued in this appeal. Defendant asserts that the Wabash County dismissal of the "felony murder" indictment was an appealable order under Supreme Court Rule 604 (Ill.Rev.Stat.1975, ch. 110A, Rule 604), and that the Williamson County court in effect overruled the Wabash County court. We disagree.

Supreme Court Rule 604 states in part:

(a) *Appeals by the State*

(1) *When State May Appeal.* In criminal cases the State may appeal only from an order or judgment the substantive effect of which results in dismissing a charge for any of the grounds enumerated in section 114-1 of the Code of

> Criminal Procedure of 1963; arresting judgment because of a defective indictment, information or complaint; . . ."

(Ill.Rev.Stat. 1975, ch. 110A, Rule 604).

[3, 4] However, because "felony murder" is only a theory of prosecution, a jury can be instructed on it, if it is supported by the evidence, even if that theory was not specifically charged in the indictment or information. (*People v. Allen*, 56 Ill.2d at 543, 309 N.E.2d at 547.) Thus the State argues, and we agree, that the Wabash County court's order was in fact a premature ruling that the jury would not be instructed on "felony murder" and as such was not appealable. Under the ruling in *Allen* an instruction can be given on "felony murder", if supported by the evidence, even if a defendant had not been indicted on that theory so long as defendant is not unfairly surprised. As to defendant's contention that one circuit court "overruled" another, it is sufficient to state that it has been held that after a mistrial caused by a hung jury, the State can file additional charges arising out of the same incident. (*People v. Miller*, 35 Ill.2d 62, 66, 219 N.E.2d 475, 478 (1966); *People v. D'Angelo*, 30 Ill.App.3d 86, 89, 333 N.E.2d 525, 528 (5th Dist. 1975).)

For the foregoing reasons, the judgment of the Circuit Court of Williamson County is affirmed.

AFFIRMED.

JONES and FRIEDMAN, JJ., concur.

Opposition

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM
1981

RECEIVED
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OFFICE OF THE CLERK
SUPREME COURT, U.S.

NO 81-1470

LEO J. MEYER

Petitioner

-vs-

UNITED STATES OF AMERICA
Ex Rel CLARENCE EUGENE WILSON

Respondents

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CLARENCE EUGENE WILSON
Reg No C-01078
BOx 99
Pontiac, Illinois 61764

Pro Se Brief in
Opposition to
Petition for
Certiorari

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IN THE SUPREME COURT OF THE UNITED STATES

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BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I

STATEMENT OF CASE

On June 10, 1970, the State of Illinois indicted Respondent Clarence Eugene Wilson in Crawford County Illinois Case No 70-Cf 3 in a Three Count Indictment charging in pertient part:

Count I..that Respondent shot and killed Fancil with a gun with intent

Count II.that Respondent shot and killed Fancil during an attempt Burglary

Count III that Respondent was attempting to burglarize a building.

Prior to the 1970 trial * Defense Counsel moved to Consolidate the two counts of Murder and proceed to trial on a single charge of Murder (Wayne TR p 3-4 **) The State opposed the Consolidation successfully stating that if a problem arose it would be "up to the sentencing judge and that the Judge was capable of fixing the sentence".

The 1970 Jury did return guilty verdicts on all three counts. The State of Illinois Prosecutors then Moved the Court to Nolle Prosse Count II, (Felony Murder) and the Trial Judge did Nolle Prosse Count II, and imposed sentences of 50 to 75 for Intent Murder and 10 to 12 years Consecutively for Count III Attempt Burglary.

* For purposes of this Brief in Opposition to Petition for Certiorari the 1970 Trial is referred to as the firs t trial. However there in 1970 a mistrial on August 3, 1970 and a con viction August 22, 1970

** The 1970 trial was moved from Crawford County To Wayne County. on hange of Venue.

After exhausting State remedies, the Honorable Seventh Circuit Court of Appeals vacated the Murder and affirimed the Attempt burglary and in alimined remand gave the State of Illinis permission to retry on Murder charge vacated within a reasonable lenght of time. (The Seventh Circuit of course did not give the State permission to retry on the elements of the Attempt burglary as it was affirmed). United States of America ex rel Wilson vs Cannon, 538 F 2d 1272 (CA 7 1976)

At the first retrial,held in Wabash County Illinois the State reinstated Count I Intent Murder of the 1970 Indictment and empaneled a new grand jury and achieved an Indictment on Felony Murder No 76-Cf 41 charging Felony Murder in its Statutory language. The 1976 Retrial Judge threw out the new Felony Murder Indictment on the grounds it violated Respondents Double Jeopardy Protection Rights and the Trial proceeded on Intent Murder. A deddlocked jury resulted and a mistrial was declared.

At the Second retrial after the Seventh Circuit Reversal the case was moved to Williamson County Illinois and over objections by the Defende that a retrial on Felony MUrder would violate his double jeopardy rights because.

1. The Count II had been Uncondidtionally nolle pross ed after jeopardy in 1970
2. That felony Murder could not be retried as the law of the case wasw that the Attempt Burglary was spearate and distinct from the Murder and Respondent had fully served and been discharged on the attempt burglary so those elements could not be retried in a felony mufder trial.

the 1977 trial Judge allowed the State to proceed on Intent Murder Count I of the 1970 Indic tment and the New Indictment 76-Cf 41 and over objections by the Defense gave the jury only a single jury verdict form to decide the guilt or innnocente of Respondent.

The 1977 trial judge then instructed the JUry that they could find Respondent "guilty" if they found him guilty of either felony murder or Intent murder. The jury marked the single verdict form guilty.

Respondent appealed and after exahusting his State remeidies the H onorable Seventh Circuit Cou t of Appeals reversed in United States of America Ex Rel Wilson vs Meyer No 80- 2194. holding the State had violated Respondent's Double Jeopardy Protection Rights.

II

QUESTION PRESENTED

The Question the Petitioner has presented seeking review by this Court is whether the nolle prosse of a felony murder count subsequent to conviction but prior to sentencing bars the State from reprosecution of a defendant for felony murder after the intent murder conviction has been vacated following defendant's appeal.

III

REASONS WHY PETITION FOR WRIT OF CERTIORARI SHOULD NOT BE GRANTED

MAY IT PLEASE THE COURT;

Judicial Notice should be taken that in this case the petitioner simply refuses to face the facts of this cas e and instead "ignore what actually happened." (Ca 7 opinion p 9) What the State ignores is that the 1970 Prosecutor was the one who drew up the Indictments and insisted that "murder in Illinois under 9-1-~~(1)(2)(3)~~ Ch 38 Ill Rev Stats were separate offenses" the Indictments drawn up by the State in 1970 are a matter of record(CA 7 Opinion P 2 and 3).

Moreover the Record speaks that in 1970 prior to trial, it was theDefense that called the State's attention to the Double Jeopardy violation that would result unless they "Consolidated the Murder Counts" (Wayne 1970 TR p 3-4), It was the State that insited they be allowed to separate the Murder Indictment into two separate offenses Count I and Count II, i.e. Intent Murder charged in Count I alleging that the Murder was separate and distinct from the Attempt Burglary, and Count II felony murder alleging that the Respondent shot and killed Fancil and did so while he was attempting an attempt burglary, i.e. that the murder and attempted burglary were related and the same and all one continous act.

The Record reflects that the State was successful in defending against the 1970 defense motion to Consolidate and the State tried the Respondent under two separate counts of Murder and a count of Attempt burglary. The State did concede that "the only problem which might arise is if the Jury voted Respondent guilty on both the charged murder counts. (Wayne TR p 3-4 1970). But the State insisted"that any

problem which would arise could be corrected by the Sentencing Judge. (Wayne TR 1970 p 3-4).

May it please the Court, this Transcript of the Wayne 1970 Pretrial Motion is so pertient to the later developments in the case that Respondent attaches for the Court's convenience a copy of the proceedings, a True and Certified Copy is of course part of the Records in this case and was considered by the Seventh Circuit. It is however a fact that the State Petitioner ignores the all-imporant proceedings prior to the 1970 trial at which time it was the State that tried the case as it was tried. The Supreme Court of the United States has clearly stated the importance of the original indictments in Double Jeopardy cases.

> Sanabria vs United States 437 US 54
> 98 S Ct 2170 (1978)
>
> "the precise manner in which an Inddctment is drawn cannot be ignored because an important function of the Indictments is to ensure that in case of any other proceedings are taken against the (defendant), for similar offense...the record (will) show with accuracy to what extent he may plead a former acquittal or conviction. 2170 at 2179

The precise way the Indictments were drawn by the State in 1970 control, for the jury did sign all three of the Counts--- the separate verdicts....guilty. At sentencing September 1, 1970 it was then up to the 1970 trial Judge to resolve the intentof the Jury, for the State had insisted prior to trial that "the Judge is capable of deciding the sentence."

The way the Indictments were drawn and guilty verdicts obtained left the 1970 trial judge with a material fact to be resolved.

> "whether the killing was done in an intent murder situation distinct and separate from the attempt burglary and hence a situation in which consecutive sentences could be imposed. COUNT I
>
> or
>
> whether the killing was done in a felony murder situation, i.e where the murder happened during or while the attempt burglary was being committed. In this type of situation, the Attempt Burglary would be "underlying felony to the felony Murder count, all related and the same and hence no consecutive sentence could be imposed. COUNT II

It is clear that Respondent could not be guilty of both conflicting theories. And it is basic in Illinois law that the trial Judge had several options in disposing of one of the Theories. For Example the 1970 trial Judge could have entered on the Record " A Directed Judgment of Not Guilty on one of the Two Counts Notwithstanding the Jury Verdict" This is accepted practice in Illinois.

The Record Reflects however, that it was the State petitioner who at the 1970 Sentencing, stepped forward and stated:

> "First off, your H onor, before pronoucning Sentence, ..the State moves to Nolle Prosse Co unt II (Felony murder).
>
> Judge: " that is the one murder while..."
>
> State :"Murder while attempting burglary"
>
> Judge: " Count II is nolled on Motion of State's Attorney.

Therefore it was the State Petitioner who set the " law of this case" in 1970 i.e. that the Intent Murder.....was separate and distinct.....from the Attempt burglary."

Conversely, it was the State Petitioner that set the law of this case" in 1970 that the Murder did not happen during the a ttempt burglary.. a prime prerequisite of "felony murder" See

> Ill Rev Stats Ch 38 Section 9-1 A notated, Committee Coments Section 9-1 subsection 9-1-(A)-(3) "felony Murder is Murder d uring an underlying 'elony."

The 1970 ruling that the Murder did not happend during the attempt burglary collaterally esto pped the State from retrying such elements. Ashe vs Swenson 397 US 436, and the Illinois State Supreme Court has adopted Ashe vs Swenson in Dept of Transportation vs Shaw 68 Ill 2d 342.

> "to operate as an estoppel by verdict, it is absolutely necessary that there shall have been afind ing of a specific fa t in the former Judgment of record that is materAl and c ontrolling in the pending case. It must also bhow that the matter of fact was so an issue that it was necesssarily determined by the Court rendering Judgment intposed as a bar to such estoppel. ".

The finding of the specific fact in the 1970 record that no felony murder situtiona existed, i.e. no murder during an attempted burglary enabled the State Respondent Petitioner to gain Consecutive Sentences for the Intent Murder and the Attempt Burglary. The Nolle Prosse of "Count II" Felony Murder was a planned and calculated ploy by the State to gain more severe punishment .

IV

> The State Petitioner's positiin is that the Nolle Prosse of Count II in 1970 did not viola e the Double Jeopardy Clauses

Respondent's position is that the Nolle Prosse of Count II, (an unconditional Nolle Prosse after jeopardy) is not only

a final termination of that Theory of Liability and a violation of the Fifth Amendment to the United States Consitution to retry the elements, but the Illinois Constitution specifically prohibits religitation of the elements also.

In Illinois, the Constitutional right to protection against Double Jeopardy is expressed by Statute. ART I, Section 10, Constitution of Illinois and Section 3-4 of Chap 38, Ill Rev Stats of the Criminal Code of Illinois

> Sec: 3-4 Effect of Former Prosecution
>
> (a) A prosectuion is barred if the defendant was formerly prosecuted for the same offense, based on the same facts, if such former prosecution:
>
> (3) was terminated improperly after the jury was empaneled and sworn"

The State Petitioner simply refuse to a cknowledge the established law that an unconditional Nolle Prosse is final, The Supreme Court of the State of Illinois expressly ruled on the effect of such an unconditional Nolle Prosse after jeopardy in People vs Hines 30 Ill 2d 152, 195 N.E. 2d 712(1964) and held that such a Nolle Prosse as in this case is a bar to to any further pros ecution, and is in fact an acquittal of the charge or charges nolle Prossed. To the same Effect, People vs Watson 394 Ill 177 68 N E 2d 265. There is Federal Authority as well as the Illinois Constitution and Statutes. See United States vs Amco Steel Corp D. C Cal 252 F Supp 364, and United States vs Chase (CA Va 372 F 2d 453, cert den 8_ S Ct 1688, 387 US. 907, 18 L Ed 2d 626)

V

The State Petitioner argues that the 1976 Appeal "wiped the slate clean".

In 1976 the Honorable Seventh Circuit Court of Appeals vacated Respondent's Intent Murder Conviction on the grounds that the State conceded "knowing use of perjured testimony." (United States of America Ex Rel Wilson vs Cannon 538 F 2d 1272) The Seventh Circuit affirmed the separate anddistinct Offense of Attempt burglary.

Upon retrial in 1977, the State insisted that the successful appeal on the"intent Murder" wiped the record clean, and gave the State permission to retry on the unsuccessfully appealed attempted burglary.

* The Felony murder was not appealed because there had been a final termination of that charge in September 1970 via the

The ingenious method the State chose to circumvent Respondent's Double Jeopardy protection on the Attempt Burglary Conviction was that the State Reindicted Respondent and retried him on Felony murder.

However, under Illinois law, before a conviction on Felony murder can be obtained, the State bears the burden of proving every element of the underlying felony, in this case attempted burglary.

> See Peoplevs Faulkner 61 Ill App 3d 84 (1978 and the jury must be instructed that the State bears t e burden of proving every element of the underlying felony. United States vs Williams 463 F 2d 958 (1972)

Therefore, it is submitted, the State by retrying felony murder in 1977 ran headlong into violations of the Double Jeopardy Protection Laws, and it is clear by established law that Respondent's successful appeal of the Intent Murder in 1976 did not waive jeopardy on the separate charge of Attempt burglary upon which the 1976 appeal was unsudccessful.

> See Green vs United States 355 U.S. 184 (1957) at 193.
>
> "the law should not, and in our judgment does not place the defendant in such an incredible dilemma. conditioning an appeal of one offense on a coerced surrender of a valid plea of former jeopardy on another offense exacts a forfeiture in plain c nflict with the Constitutional bar against double jeopardy."

It is clear that the State in retrying felony murder in 1977, sought to gain a conviction handed to them on a silver platter, i.e. in 1977 Respondent was not on "equal footing with the State, as he could not defend against "attempt burlary" as he had been convicted of attempted burglary served the sentence after being unsuccessful on appeal, and been discharged on that offense prior to the 1977 retrial for felony murder. (7th Cir. Op. P.5 footnote 6).

What the State Petitioner ignores is that it has been the law of the land since 1889 that once a person is tried and convicted on an underlying felony (attempted burglary) he cannot be subsequently retried on felony murder. The history of this well established law is as follows:

In 1833, the State of New Jersey in State vs Cooper

13 N.J.L. 361 (1833) in a felony murder case ruled that a convictionfor arson barred a subsequent felony murder indictment based on the death of the man killed in the fire.

In 1889, the Supreme Court of the United States made the principle of law expressed in State vs Cooper supra, the "law of theland" in Ex Parte Neilsen 131 US 188 (1889) holding. "where a person has been tried and convicted of a crime which has various incidents i n it, he cannot be a second time tried for one of those incidents without being twice put in jeopardy"

In 1977, the Supreme Court of the United States had occasion to apply Ex Parte Neilsen principles of law to a felony murder case again, and ruled that a person canno t be convicted of felony murder and subsequently convicted of the underlying felony. Harris vs Oklahoma 433 U.S. 682 (1977)

And in 1977, In Brown vs Ohio 432 U.S. 161, 97 S Ct 2221 (1977) citing State vs Cooper supra and Ex Parte Neilsen supra, ruled that the sequence of convictions did not matter for Double Jeopardy analysis.

> "Although in this formation, the conviction of the greater preceds the conviction of the lesser, the opinion makes it clear that the sequence is immaterial. And a another application of the same rule, the Court reported with approval, the decision of State vs Cooper 13 N.J. L. 361 (1833) where the New Jersey Supreme Court held that a Conviction for arson barred a subseqent felony murder Indictment based on the death of the man killed in the fire. Whatever the sequence may be, the Fifth Amendment forbids successive prosecutions and cumulative punishment for a greater and lesser included offense." Emp add 97 S Ct 2221 at 2227

Wherefore, it is clea r from Supreme Court of United States rulings that Respondent in this instant case was unconstitutionally convicted of felony murder subsequent to his conviction on Attempt burglary

(Judicial Notice may also be taken that the "law of this case established by the State in 1970 was that the Intent Murder and Attempt Burglary were unrelated and distinct and separate.) But in 1977 the State completely switched the Law of the Case and insisted the Attempted burglar y was one and the same with Murder, i.e. that attempted burglary was an underlying felony to felony Murder. It is is submitted that either of the State Positions retrial in 1977 was barred, for if as the law of the

Case reflects that the Intent Murder is distinct from the attempt burglary as the State insisted for the years of 1970, 1971, 1972, 1973, 1974, 1975 and 1976 then there is no felony mufder situation at all, for the prime reqiuement of felony Murder is that the Murder must be committed during or while theunderlying felony is being committed. Ill Rev Stats Ch 38 Annoted Section 9-1, Subsection 9-1-(A)"(3). * and if as from 1977 until to date, the law of the case is changed as the state insists, that the Attempted burglary is not distinct and separate, but an underlying included offense offense of felony murder, then the State was collatterally estopped from retrying felony murder for the reasons expressed i n Harris vs Oklahoma and Brown vs Ohio supra. Under either proposition respondents double jeopardy rights were grossly violated.

VI

(1974) The State Petitioner alleges that because in [redacted], Illinois Law states that "the subsections of Illlinois Murder Statutes are all one crime with diffent theories that the theories are not subject to Do uble Jeopardy protections.

The State relies upon People vs Allen 56 Ill 2d 536, 309 N.E. 2d 544 (1974) to support their allegation that "because in Illinois(at least since 1974) that there is but one crime of murder in Illinois and the subparagraphs of Ill Rev Stats Ch 38, Sec 9-1 constitute theories of murder. (7th Cir opinion p. 2)

The State Petitioner therefore take the position that there can be no jeopardy on the "theories " of Illinois's Murder Statute.

It is submitted however that as the facts of this case reflect, the State's reliance on Allen is misplaced.

---

* The Honorable Seventh Circuit no doubt noted this as on p. 12 of Opinion, the Court noted. If Wilson had been permitted to appeal felony murder, it is possible the court would have declared felony murder invalid-based on insuffiecent evidence.. Of course an admittance by the State of Illinois that no felony murder situation existed, i.e. no murder happening during an attempted burglary would be insufficient,evidence under Burks vs United States 437 U.S. 1 (1978)

It is somehat ironical that even in 1977 at retrial, the State, while trying respondent for "felony murder " admitted at Conference on Instructions (Williamson County) that the burglary was over with when the murder begin. Hence no felony murder situation. This Admittance by the State was made in

First: The State Petitioner's reliance on Allen overlooks the ultimate fact that it was the State in 1970 at the original trial that insis ted the subsections of Illinois' murder Statute could be split, declared separate and tried under separate counts. See Exhbit A Attached, which reflects, the State even opposed the Defense Motion to Consolidate Count I charging 9-1-(A)-(1) and Count II which included 9-1-(A)-(3). and tried the 1970 Case under the separate Counts with separate verdict forms. And of course, strict adherecne to the way the Original Indictment was drawn is mandated by the United States Supreme Court in Sanabria vs United States supra, which s tates unequivocally, "what matters is what was done, not what a party thinks should have been done by hindsight.

Secondly: The United States Supreme Court has ruled in two major cases that "theories of one crime are separable and subject to Double Jeopardy Protecgions."

> The first case is Green vs United States 355 US 184 (1957) which the Seventh Circuit called attention to on page 8 and 9 of Opinion.
>
> Green was indicted on one count which implicitly c harged first degree murder and second degree murder, two theories of one murder.
>
> In his second appeal, the United StatesSupreme Court held that Green did not waive jeopardy on the first degree murder, that the two theories of murder were separable and the Double Jeopardy Clause prohibited retrial on the first degree theory.

Later in Sanabria vs United States 437 U.S. 54 (1978) the United States Supreme Court held that although only one count was involved, the count involved two separate theor ies of libbility, and that double Jeopardy applied to each theory.

Certainly in this instant case, the State explicitly charged different theories in different counts of an Indictment, each reuring diff erent elements of proof in 1970. That the record of this case it is submitted clearly reflect double jeopardy violations on the "1970 separated subsections of Illiinois's murder statute.

Third.. The State petitioner misreads People vs Allen supra upon which they relie.

The Supreme Court of Illinois while ruling in the 1974 case of People vs Allen supra, that in Illinois "there is but one crime of murder", then went on to clarify that for double jeopardy purposes the Subsections of Illinois Murder Statute were subject to double jeopardy, and clarified also that the Subsections could be tried separately, i.e. one subsection could be tried without trying the other subsections.

> "if the defendant were charged under subparagraph (A)-(1) and acquitted, he could not again be charged and tried for the same Individual under subparagraph (a)-(2) or (a)-(3). Also the provisions of our Statute covering the apects of a former prosecution (Ill Rev Stats Sec 3-4) prohbits a subsequent prosecution under such circumstances." emp add.

Therefore the State Petitioner cites Allen as if in this instant case, the 1977 trial was the first trial, when in fact, it was at the 1970 trial that the subsections were tried separately in Respondents case.

Moreevoer, Respondents case is not the only case that aperson in Illinois was tried under "separated subsections of Illinois's murder Statute.

See People vs Faulkner 61 Ill App 3d 84 (1978). Faulkner was indicted and tried on only Subsection 9 (a)-(3) of Illinois's murder Statute. (Felony Murder) His case was subsequently vacated "because the State were unable to prove the underlying felony to the Felony murder". A Fortiori, in this instant case, in 1970 the State tried Felony murder in a separate count, Nolle Prossed the Count, and pronounced sentence (Consecutive Sentences) on Intent murder and Attempt burglary, hence in the 1977 Retrial, the State were unable to prove the underlying felony to the felony murder without running afoul of the Double Jeopardy Clauses because Respondent had been discharged upon the Attempt Burglary prior to 1977 retrial.

Thus it is submitted there is a world of difference in People vs Allen upon which the State Relies and this instant case, See People vs Faulkner and cases cited within, for cases more in point. Of Course Illinois law is identical to Oklahoma law on Felony Murder so that the factual circumstances in Harris vs Oklahoma supra control this case.

CONCLUSION

Respondent submits that it would serve no public interest to grant Certiorari for the reasons:

1. The 7th Circuit Opinion is consistent with applicable case law both in Illinois and the United States Supreme Court, when the facts of this case are considered.

2. That there is no conflict among the other Federal Circuits with the Seventh Circuit Opinion.

3. That the Illinois Constitution explicity holds that a Nolle Prosse af ter jeopardy, and uncondiational bars further prosecution. (Ill Const. Art I, Sec 10, Ill Rev Stats Chap 38 Sec 3-4 (3)

4. That the Supreme Court of the United States has previously held that "felony murder cannot be retried subs equent to a trial and conviction on the Underlying Felony. Harris vs Oklahoma and Brown vs Ohio supra, and that the Successful Appeal on one theory of Murder did not waive jeopardy on the other theory not appealed or unsuccessful on appeal. Green vs United States supra.

Respo ndent also urges that the Writ of Certioriari should not be granted for the reason, that the S ate petitioner had made firm admissions on the record that the Murder and attempted burglary are not related hence no felony murder crime was committed, under the law of t his case. Moreover the State has made firm admissions on the Record that was before the Seventh Circuit that Respondent did not shoot and kill Fancil (Wabash County Conference on Instructions 1977) Hence it would be a case of Justice delayed, Justice denied, to this Innocent Citizen who has already been deprived of his Freedom over 11 and 1/2 years and is at present held without Bail.

The Greatness of a Society can be measured in the way it treats its criminally accused, hence no public interest could be served, and Respondent respectfully urges the Writ of Certioriari should not be granted.

Respectfully submitted,

Clarence Eugene Wilson

Clarence Eugene Wilson C-01078
Box 99, Pontiac Ill, 61764
In Pro Se

IN THE
SUPREME COURT OF THE UNITED STATES

LEO J. MEYER,
Petitioner

-vs-
UNITED STATES OF AMERICA EX REL
CLARENCE EUGENE WILSON,
Respondents

NO_____

MOTION TO PROCEED IN FORMA PAUPERIS
AND
AFFIDAVIT IN SUPPORT

Now comes Respondents and seeks leave of the Court to file Brief in Oppostion to the Petitioner's Petition for Certiorari, to the Seventh Circuit Court of Appeals, and in support submits.

A That Respondent is a poor and indigent person and was given permission by the Courts below including the Honorable Seventh Circuit Court of Appeals to proceed in Forma Pauperis.

B. That neither theDistrcit Court or the Seventh Circuit Court of Appeals appointed counsel for respondent under theCriminal Justice Act of 1964, as amended Title 18 USC 3006 (d) 6 (18 USCS 3006 (d) 6, and therefore Respondent must answer the State Petitioner in pro se, although amicus curiae counsel was allowed to oral argue the case in 7th Circuit.

C. That the Petitioner's Petition for Certiorari does not meet requirements of the criteria for review on Certiorari Supreme Court Rule 19 et al, and no public interest would be served to grant certiorari and Respondent verily believes the Seventh Circuit Court of Appeals Decision should be affirmed and Certiorari denied.

D. That Respondent is held without bail andunable to have access to law libraries and legal help and respectfully invokes Supreme Court Rule 47 et al.

E. That Respondent has no monies or real estate or other means to file and prosecute his Brief in Opposition to the Petition for Certiorari filed by the State of Illinois, and has only approximately 35.00 (thirty five dollars on his prison account.

Signed Clarence Eugene Wilson
Clarence Eugene Wilson
Reg No C-01078
Box 99
Pontiac, Illinois 61764

Subscribed and sworn to before me
this 28th day of January, 1982

Deborah Bryson
NOTARY PUBLIC

J.A.K.

MAR 15 1978

RECEIVED

OUTSIDE PRESENCE OF JURORS

ON MOTION FOR SEVERANCE:

Mr. Whitmer: The State objects to Severance in that the incident is one and the same, here the attempted burglary was being committed and the matter was committed. The actions all arise out of one incident and the parties are all the same and the evidence is identical, and I see no way it would jeopardize the defense of the Defendant.

MR. ALLISON: The distinctive act of attempted robbery would have been over with at the time Officer Fancil arrived at the scene; any act regarding the murder of Officer Fancil would have been after that.

Mr. Whitmer: The Second Count charges murder while in the act of committing the offense of Burglary.

THE COURT: The record will show that the Motion was argued and the Motion overruled.

ON MOTION FOR CONSOLIDATION:

MR. ALLISON: We would ask that Counts 1 and 2 in the Indictment be consolidated, both contain the charge of Murder, and therefore to try him on both counts would be repetitive. The State's Attorney should elect between the two Counts on which one he wishes to proceed on; a conviction on

EXHIBIT A - A TRUE COPY OF 1970 TR, P. 2-3-and 4. (SUCH Record Was/is PART OF RECORDS IN SEVENTH CIRCUIT

. . the second Count would result in double jeopardy. I don't see any need for two separate Counts, both Counts alleging that he committed the offense of murdering William Jackson Fancil, the Second Count being different from the First Count only that he committed the offense while attempting to commit the offense of Burglary; to avoid this double jeopardy we move for the consolidation of Counts 1 and 2 or election by the State's Attorney on which Count he wishes to proceed.

MR. WHITMER: Again I would oppose severance, in that the Indictment involving the first two counts of murder is in the words of the statute, and the statute is written in this fashion -- A person who kills an individual without lawful justification commits murder if, in performing the acts which cause the death: 1. He either intends to kill or do great bodily harm to that individual or another, or knows that such acts will cause death to that individual or another; or 2. He knows that such acts create a strong probability of death or great bodily harm to that individual or another; or - this is one wording of the statute, and of course, the principal is just as guilty as an accomplice - we don't know what the evidence is going to prove to the jury, and the third paragraph of the Section under Murder says - 3. He is attempting or commit

a forcible felony other than voluntary manslaughter. These are all acts involving murder. And, I feel that the two Counts are necessary because we don't know what the evidence will prove to the Jurors, and one would indicate that the Defendant was the principal, actually pulling the trigger, and the other section of the statute where we used it in Count II of the Indictment where death resulted while attempting or committing a forcible felony. We think they are both necessary in that we don't know what the evidence will prove to the jurors. We think it is proper that the jury have a chance to consider both Counts; the only problem that would arise would be if they find him guilty on both counts, and this is merely up to the sentencing and the Judge would have to control the situation and it would not be up to the jurors, and the court is capable of deciding the sentence. C.C.W replaces

MR. ALLISON: If they would find him guilty they would have convicted him twice for the murder of one man.

THE COURT: The record will show the Motion argued and the Motion overruled.

MOTION FOR DECLARATORY JUDGMENT:

MR. ALLISON: Antagonism toward the Defendant because a juror might be locked up with other jurors during the pendency

Emp added

Petitioner's Reply Brief

Office - Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS
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No. 81-1470

In the Supreme Court of the United States

OCTOBER TERM, 1981

LEO J. MEYER, WARDEN,
PETITIONER,

vs.

CLARENCE EUGENE WILSON,
RESPONDENT.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW (ADDENDUM)

Wilson v. Meyer, the decision which this Petition seeks review of, is now reported at 665 F.2d 118 (7th Cir. 1981).

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

THE "NOLLE" OF A REDUNDANT FELONY MURDER COUNT, AFTER CONVICTION BUT PRIOR TO SENTENCING, DID NOT BAR THE STATE FROM REPROSECUTING THAT COUNT WHEN THE CONVICTION ON THE INTENT MURDER COUNT WAS SUBSEQUENTLY REVERSED AND RETRIED. THE COURT OF APPEALS' DECISION TO THE CONTRARY STEMS FROM A MISINTERPRETATION OF ILLINOIS LAW AND A MISAPPLICATION OF THIS COURT'S DECISIONS.

The respondent citing *Brown v. Ohio*, 432 U.S. 161 (1977), and *Harris v. Oklahoma*, 433 U.S. 682 (1977), contends that his conviction for attempt burglary in 1970 precluded any subsequent prosecution for felony murder under *Ill. Rev. Stat.* ch. 38, § 9-1(a)(3) (1969). Br. in Opposition at 7-9. However, the respondent is only able to arrive at this conclusion by utilizing a simplistic and erroneous approach which ignores important factual distinctions as well as relevant case law.

In *Harris*, the defendant was first convicted of felony murder with the underlying felony being robbery with a firearm. The defendant was brought to trial again and convicted on the separate charge of robbery with a firearm. This Court, finding that the murder conviction could not be had without conviction of the lesser crime, vacated the robbery conviction on the basis of the Double Jeopardy Clause. A key to that decision was a concession by the prosecution that "in the Murder case, it was necessary for all the ingredients for the underlying felony of Robbery with Firearms to be proved. . . ." 433 U.S. at 682.

Similarly, in *Brown*, this Court found that the Double Jeopardy Clause barred a later prosecution and punishment for the felony of auto theft following the defendant's conviction for the misdemeanor of taking or operating the same vehicle without the owner's consent. Imperative to the decision was the fact that under Ohio law, the "joyriding" misdemeanor offense was a lesser included offense of the felony auto theft violation.

Substantive Illinois law must be considered in conjunction with this Court's decisions in determining whether cumulative punishment can be imposed by a court after the defendant's conviction on multiple charges. *See Albernaz v. United States*, ____ U.S. ____, 101 S.Ct. 1137 (1981); *Whalen v. United States*, 445 U.S. 684 (1980). A principle ingrained in Illinois criminal law is that one can be convicted and sentenced for both felony murder and the underlying felony. *People v. Green*, 62 Ill.2d 147, 340 N.E.2d 9 (1975), *cert. denied*, 426 U.S. 925 (1976); *People v. Gulliford*, 86 Ill. App. 3d 237, 407 N.E.2d 1094 (3rd Dist. 1980); *e.g.*, *People v. Miller*, 89 Ill. App. 3d 975, 412 N.E.2d 175 (3rd Dist. 1980).

A recent analysis of this principle is found in the *Gulliford* decision. There, the defendant appealed his convictions for felony murder and the underlying felony of armed robbery. The testimony had established that the defendant and two others drove around in search of a robbery victim. After finding their victim, one of the defendant's companions, for whom he was held legally accountable, severely beat the victim with a metal pipe. The blows rendered the victim unconscious and the offenders proceeded to rob him. The victim subsequently died from the blows he had received.

In reviewing the defendant's double jeopardy claim, the court stated:

> The test to be applied to determine whether there are two offenses or only one for double jeopardy purposes is

> whether one statute requires proof of a fact which the other does not. (*Brown v. Ohio* (1977), 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187). Such a test presumes that the same act constitutes a violation of two distinct statutory provisions. An act, as used in this context, has been defined as an overt or outward manifestation which would support a different offense. (citation omitted)

86 Ill. App. 3d at 243, 407 N.E.2d at 1099. Despite the interrelationship of the acts committed, the court upheld the defendant's convictions for both felony murder and armed robbery. The court noted that prejudice only results in those instances where more than one offense is carved from the same physical act. *People v. King*, 66 Ill.2d 551, 566, 363 N.E.2d 838, 844 (1977). The court rejected the defendant's double jeopardy argument "because two separate distinct acts of the defendant were present and the offense of felony murder required proof of a different fact, i.e., the resulting death." 86 Ill. App. 3d at 244, 407 N.E.2d at 1099.

Moreover, the *Gulliford* court then rejected the argument that armed robbery is a lesser included offense of felony murder. In proving felony murder, "proof that the underlying felony occurred is not used to establish that felony *per se* but is used to establish the requisite substitute intent for felony murder." 86 Ill. App. 3d at 422, 407 N.E.2d at 1100.

In applying the decisions of this Court and the Illinois reviewing courts, it is apparent that the petitioner's conviction for murder is valid. Unlike *Brown* and *Harris*, the State initially tried the petitioner on three separate indictments in one consolidated proceeding.[1] The jury returned guilty verdicts as

---

[1] It should be noted that in *Harris*, Justice Brennan, in a concurring opinion joined by Justice Marshall, stated that a reversal of the robbery conviction was necessary on the ground that the State did not prosecute the two informations in one proceeding. 433 U.S. at 683.

to attempt burglary, intent murder and felony murder. Federal and Illinois law mandated that judgment and sentence only be entered on attempt burglary and on the more serious murder verdict, i.e., intent murder. *Blockburger v. United States*, 284 U.S. 299 (1932); *People v. Holiday*, 21 Ill. App. 3d 796, 316 N.E.2d 236 (1st Dist. 1974); *See* Petition for Writ of Certiorari at 16. However, it would also have been lawful to impose judgment and sentence on the attempt burglary conviction and the felony murder conviction. *Green, supra; Gulliford, supra.*

By successfully appealing the murder conviction, the State was free to reprosecute the respondent under any of the statutory theories contained in *Ill. Rev. Stat.* ch. 38, § 9-1(a) (1969). *United States v. Scott*, 437 U.S. 82, 91 (1978); *United States v. Ewell*, 383 U.S. 116, 124-25 (1966). As noted by the district court in affirming the respondent's murder conviction:

> [I]t would be unjust and contrary to the policy behind the double jeopardy clause to allow the [respondent] to escape conviction due to a procedural quirk which has not harmed [him] in any way.

United States ex rel. Wilson v. Meyer, No. 79 C 2285 (S.D. Ill. June 27, 1980)(Appendix B at 4-5).

CONCLUSION

For the foregoing reasons, petitioner prays that this Court grant the instant Petition for Writ of Certiorari and, upon review, reverse the Court of Appeals' decision which granted habeas corpus relief to the respondent.

Respectfully submitted,

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February 16, 1982